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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1962

No. [redacted] 731

RALPH RICHARDSON, ... **Petitioner,**

versus

C. C. BRUNNER, alone Case 1, . . **Respondent.**

C. C. BRUNNER, **CITY OF LOUISVILLE, KENTUCKY,** **VERNON H. WETHERBY,** Tax Receiver, **WM. B. MEYER,** Director of Finance, **HON. JOHN B. BRECKINRIDGE,** Attorney General.	Case 2	**Respondents.**

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY.

Civil rights include Constitutional guarantee to notice and a hearing *before, not after,* the taking of private property even for the collection and payment of municipal taxes..

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IN THE

Supreme Court of the United States

OCTOBER TERM 1961

No. ______.

RALPH RICHARDSON, - - - - - *Petitioner,*

v.

C. C. BRUNNER, alone **Case 1**, - - - *Respondent,*

C. C. BRUNNER,
CITY OF LOUISVILLE, KENTUCKY,
VERNON H. WETHERBY, Tax Receiver for the City of Louisville, Kentucky,
WM. B. MEYER, Director of Finance for the City of Louisville, Kentucky,
HON. JOHN B. BRECKINRIDGE, Attorney General for the State of Kentucky.
} **Case 2** *Respondents.*

(Case 1 and 2 Consolidated)

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY.

I.

THE PETITION.

May it please the Court:

A. Opinions of the Court Below Are:

Richardson v. *Brunner*, 327 S. W. 2d (Ky.) 572, See Appendix I, pp. 56-59.

Richardson v. *Brunner*, 328 S. W. 2d (Ky.) 530, See Appendix II, pp. 60-61.

Richardson v. *Brunner, et al.*, 356 S. W. 2d (Ky.) 252, See Appendix III, pp. 63-66.

This writ is sought from the last opinion above mentioned.

B. Grounds on Which the Jurisdiction of This Court is Invoked.

The grounds on which the jurisdiction of this Court is invoked are; that KRS 91.540 (see Appendix IV, pp. 77-78): (1) is unconstitutional and contrary to the Fifth Amendment of United States Constitution in taking Petitioner's private property for public use or purposes without just compensation—"nor shall private property be taken for public use without just compensation"; (2) and is unconstitutional and contrary to Section One of the Fourteenth Amendment—"nor shall any State deprive any person of * * * property without due process of law"; and (3) that the Default Judgment of October 22, 1956 (Case 1, Tr. 1, pp. 16-17) is void because the Complaint (Case 1, Tr. 1, pp. 10-12) did not state a cause of action which conferred jurisdiction on the court to grant a default or any judgment, and the taking of Petitioner's property on a void judgment is most certainly taking it without due process of law.

C. Date of Judgment (Opinion) Sought To Be Reviewed.

The Judgment or Opinion of the Court of Appeals of Kentucky sought to be reviewed, was rendered Friday, February 2, 1962.

D. Date of Order Respecting Rehearing:

The Court of Appeals of Kentucky denied Petitioner's Petition for a Rehearing on May 4, 1962.

E. Statutory Provisions Believed to Confer Jurisdiction on This Court.

Petitioner believes that 28 U.S.C.A., Sec. 1257(3), confers jurisdiction on this Court to grant him a Writ of Certiorari, and he also believes that the following Federal Rules of Civil Procedure confer jurisdiction upon this Court, namely: Sub. (6) of Paragraph (b) of Rule 12 of the Federal Rules of Civil Procedure, 28 U.S.C.A., pp. 13 and 14, 1960 Edition; Sub. (1) of Paragraph (h) of Rule 12 of the Federal Rules of Civil Procedure U.S.C.A., p. 15, 1960 Edition; and Paragraph (c) of Rule 55, p. 289, 1960 Edition, 28 U.S.C.A., Federal Rules of Civil Procedure; and Sub. (1), Sub. (3), Sub. (4) and Sub. (6) of Sub. Paragraph (b) of Rule 60 of the Federal Rules of Civil Procedure, 28 U.S.C.A., p. 122, 1960 Edition.

F. Questions Presented For Review.

(1) DOES KRS 91.540 TAKE PRIVATE PROPERTY WITHOUT JUST COMPENSATION?

Cases 1 and 2. Is KRS 91.540 (see Appendix No. IV, pp. 77-78) by which the City Tax Receiver of Louisville, Kentucky, conveyed in fee Petitioner's property, worth between $23,500.00 and $34,000.00, to Respondent, C. C. Brunner, for a mere pittance—taxes, interest, penalties and costs, amounting to less than $1,200.00—contrary to the Fifth Amendment of the U. S. Constitution—"Nor shall private property be taken for public use without just compensation?"

(2) DOES KRS 91.540 DEPRIVE ONE OF PROPERTY WITHOUT DUE PROCESS OF LAW?

Cases 1 and 2. Is KRS 91.540 (see Appendix No. IV, pp. 77-78) by which the City Tax Receiver of Louisville, Kentucky, conveyed in fee Petitioner's property, worth between $23,500.00 and $34,000.00, to Respondent, C. C. Brunner, for a mere pittance—taxes, interest, penalties and costs, amounting to less than $1,200.00—contrary to Section 1 of the Fourteenth Amendment to the U. S. Constitution—"Nor shall any State deprive any person * * * of property without due process of law?"

(3) TAKING PROPERTY UNDER VOID JUDGMENT IS WITHOUT DUE PROCESS OF LAW.

Case 1—Is the default judgment of October 22, 1956, based (1) on a Complaint that did not state a cause of action, which did not give the Court jurisdiction, void? Is not the taking of property by a void judgment, taking it without due process of law? And (b) does said default judgment, based on unconstitutional statute, establish any rights, or is it a nullity?

G. Constitutional Provisions, Statutes and Rules of Civil Procedure Involved.

The Fifth Amendment and Section I of the Fourteenth Amendment of the Constitution of the United States are involved: Subsection 5 of Section 1, Sections 2, 11, 13, 14, 26, 27, Subsection 12 of Section 59, Section 171 and Section 242 of the Constitution of the

State of Kentucky are involved. 28 U.S.C.A., Judiciary and Judicial Procedure, Section 1257 (3) pp. 88, 1960 Edition, is involved. Sub. (6) of paragraph (b) of Rule 12 of the Federal Rules of Civil Procedure, 28 U.S.C.A., pp. 13 and 14, 1960 Edition; Sub. (1) of paragraph (h) of Rule 12 of the Federal Rules of Civil Procedure, 28 U.S.C.A., p. 15, 1960 Edition; Paragraph (e) of Rule 55 of the Federal Rules of Civil Procedure, 28 U.S.C.A., p. 289, 1960 Edition; and Sub. (1), (3), (4), and (6) of Paragraph (b) of Rule 60 of the Federal Rules of Civil Procedure, 28 U.S.C.A., pp. 121 and 122, 1960 Edition, are involved. The Kentucky Statutes involved are KRS 91.470, 91.480, 91.490, 91.510, 91.540, 91.560 and KRS 418.040, 418.045 and 418.050 and Kentucky Rules of Civil Procedure 1, 8.01, 12.02, (6), 12.08 (1), 55.02 and 60.02 (1), (3), (4), and (6), and Rule 57 are involved, 1953 Edition Appendix IV pp. 68-80.

H. Concise Statement of Cases Containing the Facts Material to the Consideration of the Questions Presented.

CASE 1.

We believe that it will enable the Court to better understand the real issues involved if we relate in detail the history and background of Case 1 and the legal steps taken in that case as shown by the record, that is the pleadings, motions, affidavits, etc. On August 12, 1948, your Petitioner purchased the property consisting of three city lots, involved in this action, for $17,000.00. He had this property in a Real Estate Agent's hands for the collection of rents. It was sold by the City Tax Receiver in the year 1950 under KRS 91.430 to the Respondent, C. C. Brunner for city taxes amounting to $308.34. Petitioner received no notice of said sale. His agent informed him of this fact and advised him to contact Respondent's attorneys and redeem it. Within the time allowed for redemption your Petitioner did approach Respondent's attorneys and offered to redeem his property by paying far more than the amount of the delinquent tax bills, interest, penalties and costs, but Respondent's attorneys demanded an exorbitant amount, namely, $7,000.00 and he could not raise it (see Petitioner's Supplemental Affidavit, Case 1, Tr. 1, p. 49).

One of Respondent's attorneys admitted that he had talked to your Petitioner about repurchasing the property involved from the Respondent and did not deny that $7,000.00 had been demanded (see Affidavit of Josiah B. Gathright, one of Respondent's Counsel, Case 1, Tr. 1, p. 24).

On May 1, 1956, Respondent filed his complaint (Case 1, Tr. 1, pp. 10-12) under KRS 91.540 but as we shall hereinafter clearly show, did not state a cause of action which conferred jurisdiction upon the Court to grant the default judgment of October 22, 1956 or any judgment. Hence the default judgment is void, and takes Respondent's property without due process of law, which we shall hereinafter more clearly show. After summons was served on Respondent on May 24, 1956 and before the default judgment he tried to employ counsel but was unable to do so for two reasons, (1) each lawyer that he approached demanded a substantial cash retainer fee which he could not advance or pay, and (2) because Respondent was collecting the rents from his property (see Petitioner's Supplemental Affidavit, Case 1, Tr. 1, p. 50). After the default judgment your Petitioner employed Mr. Stewart Miller for an agreed fee of $2,000.00 if he, Mr. Miller, could win. On November 23, 1956, Mr. Miller as attorney for the Petitioner gave notice that he would move the Court, and did move the Court to set aside the default judgment of October 22, 1956 and in support of said motion filed Petitioner's affidavit showing that he had ample personal property (KRS 91.470) subject to distraint to pay the taxes (see Motion and Affidavit, Case 1, Tr. 1, pp. 14 and 19-23). Petitioner filed also the affidavits of Charles Strull, Judge Thomas J. Knight and Carl K. Helman in support of his motion (see Case 1, Tr. 1, pp. 25-28). On December 3, 1956, the Court overruled the motion to set aside the default judgment (see Order, Case 1, Tr. 1, p. 18). Mr. Miller gave notice of appeal (see Case 1, Tr. 1, p. 29). Thereafter Mr. Miller wanted your Petitioner to give a quitclaim deed to the property for almost nothing and agreed to take $500.00 fee. Your Petitioner declined to do it and Mr. Miller withdrew from the case and returned his file to your Petitioner (see Petitioner's Supplemental Affidavit, Case 1, Tr. 1, p. 50) and on February 26, 1957, your Petitioner employed H. E. Rose and Robert Hubbard on a contingent basis, at which time motion for extension of a time to file an appeal was granted (see Case 1, Tr. 1, pp. 30). Thereupon Petitioner gave notice to take depositions for discovery purposes and Respondent moved the Court not to permit the taking of said discovery depositions and the Court sustained Respondent's motion and refused to permit the Petitioner to take depositions for discovery purposes (see Case 1, Tr. 1, pp. 32-33). Thereafter, Petitioner again moved the Court to set aside the default judgment and for leave to file an answer and counterclaim and for leave to file a supplemental affidavit.

The Court refused to permit him to do this but did order the tendered answer and supplemental affidavit, made a part of the record for the purpose of appeal. His motion was overruled on March 15, 1957 and notice of appeal was given, and the Schedule of Appeal to the Court of Appeals of Kentucky was filed, and again on March 22, 1957, your Petitioner moved the Court to set aside the default judgment which was overruled, and notice of appeal from that order was taken.

All of these orders were appealed to the Court of Appeals of Kentucky. The lower Court, the Court of Appeals of Kentucky on March 6, 1959, affirmed the trial court and denied permission for rehearing on October 16, 1959 (see Richardson v. Brunner, Ky. 327 S. W. 2d 572, Appendix 1, pp. 56-59).

Under argument we will hereinafter discuss that opinion.

I. Former Petition For Writ of Certiorari Denied.

This Court, when they deny a petition for a Writ of Certiorari, does not set forth or give any reason for denying it, but they have repeatedly stated that unless the question was raised in the Court below, they would not consider it. In his response to that Petition, Respondent, Brunner, repeatedly claimed that no constitutional question was raised in the Court below and consequently this court had no jurisdiction. On page eight of his response to that petition, he said:

> "Respondent insists that no constitutional questions have been raised in this court, and especially in the court below."

On page eleven, he said:

> "The Supreme Court has no jurisdiction where alleged unconstitutionality was not raised below."

On page sixteen, he said:

> "The validity of the statute that governs this petition is not before the court and was not before the trial court below."
>
> "The Federal right must have been set up and adjudicated against the claimant by the judgment of the State Court." Cleveland & P. R. Co. v. Cleveland, 235 U. S. 50, 59 L. Ed. 127.
>
> "Writ of Certiorari will be dismissed where record fails to disclose that complaining party definitely raised Federal question in State Court." Missouri Pac. R. R. Co. v. Hanna, 266 U. S. 184, 69 L. Ed. 235.

We do not know why, but we concluded that this Court denied that petition because no constitutional question had been raised in the Court below. Hence, on April 14, 1960 by motion in Case 1, your Petitioner definitely raised the constitutional question both Federal and State (see Case 1, Tr. 4, pp. 130-135) and in Case 2 on March 24, 1960, your Petitioner definitely raised constitutional question both Federal and State in complaint for Declaration of Rights (see Case 2, Tr. 1, pp. 5-17). His motion in Case 1 was overruled (see Case 1, Tr. 4, p. 140) and his complaint in Case 2 was dismissed on May 23, 1960 (see Case 2, Tr. 1, p. 28). Appeals were duly taken to the Court of Appeals of Kentucky and the Trial Courts were affirmed on February 20, 1962. A petition for rehearing was overruled on May 4, 1962.

Your petitioner, firmly believing that his cause is right and just and that the lower Court has grievously erred, comes again to this Court in a petition for a Writ of Certiorari.

J. State of Proceedings Where and When Federal Questions Raised.

CASE 1.

On April 14, 1960 by motion (see Case 1, Tr. 4, pp. 130-135), Petitioner raised Federal question before the trial Court and before the Court of Appeals of Kentucky in Richardson v. Brunner, Ky. 356 S. W. 2d 252 (see Appendix III, pp. 63-66).

CASE 2.

On March 24, 1960 by complaint and amended complaints (see Case 2, Tr. 1, pp. 5-17) raised before the trial Court Federal questions and before the Court of Appeals of Kentucky—The Court below in Brunner v. Richardson, *et al.*, Ky. 356 S. W. 252 (see Appendix III, pp. 63-66).

II.

ARGUMENT AND CONTENTIONS WHICH PETITIONER MOST RESPECTFULLY MAINTAINS FULLY AND AMPLY SUPPORT REASONS WHY THE COURT SHOULD GRANT HIS PETITION FOR A WRIT OF CERTIORARI AND REVERSE THE LOWER COURT.

A. Preliminary Remarks.

May these preliminary remarks, though not found in or required by the rules of this Court, be appropriate, persuasive and acceptable to this Honorable Court.

1. APOSTLE PAUL BEFORE KING AGRIPPA.

About nineteen hundred years ago one of the greatest men in all history, the Apostle Paul, appeared before King Agrippa and said:

> "I think myself happy, King Agrippa, because I shall answer for myself this day before thee touching all the things whereof I am accused of the Jews:

> "Especially because I know thee to be expert in all customs and questions which are among the Jews: wherefore, I beseech thee to hear me patiently." Acts, Chapter 26, verses 2-3.

Indeed, we are happy and exceedingly glad that we have the privilege of petitioning this Honorable (not only the highest Court in the United States of America, but possibly the highest in the world) Court to right a grievous wrong not only to Petitioner, but a very possible and probable injury or wrong to every present and future property owner in Louisville, Kentucky and in the United States. Therefore, we very sincerely and earnestly beseech this Honorable Court to patiently and thoughtfully consider petitioner's earnest argument and reasons for relief hereafter set forth.

As Paul continued his irresistible, forceful and logical argument, "Festus said with a loud voice, Paul, thou art beside thyself, much learning doth make thee mad. But he said, I am not mad, most noble Festus; but speak forth the words of truth and soberness." Acts, Chapter 26, verses 24-25.

Now, we make no pretense to having such learning and we know that we are not mad—crazy—but also know that with unflagging and determined zeal (not fanatically, at all) we very, very sincerely and earnestly plead with this Court to right a wrong—a harsh injustice (that should make just men, civilized society blush with shame) done to your petitioner. And we, as we shall hereinafter more fully show, earnestly contend that the argument hereinafter set forth is in accord with the eternal, unchangeable, inalienable, constitutional rights of men to have their property protected against confiscation through the collection of taxes.

As Paul was about to conclude his case, "Then Agrippa said unto Paul, Almost thou persuadest me to be a Christian." Acts, Chapter 26, verse 28.

The record is silent as to whether or not King Agrippa became a Christian, but we are very confident that when the members of this Honorable Court read the reasons for asking this petition for a Writ of Certiorari, the Court will grant it and reverse the lower Court.

2. CHURCHILL—"ENGLAND'S DARKEST HOUR" —OUR PERSISTENCE.

The lower Court concluded their opinion in Case 1 with these words, "We deem it appropriate to make this comment that there may be some ultimate limit upon the number of motions that may be filed to set aside a judgment under CR 60.02." We would deem ourselves unworthy of our profession, if we shrank from our duty to exhaust every remedy available to us to relieve Petitioner from the very gross injustice, the harsh judgment—(literally confiscating his property for the benefit of Respondent, C. C. Brunner), which the lower Court, we most earnestly contend, has imposed upon him. We are doing so at a very great sacrifice. Of Duty, Robert E. Lee, said "Duty then is the sublimest word in our language. Do your duty in all things. You cannot do more. You should never wish to do less."

In 1940, "in England's darkest hour", perhaps, one of the darkest hours in the history of the world, Churchill, when despair apparently reigned supreme, when hope was almost vanished and gone, refused to either surrender or consider dishonorable terms of peace. He was fighting for a great eternal, unchangeable principle, Freedom, not only for the British Isles, but, in a very real sense, for the world. He finally won, yet the struggle still goes on.

Now, we are not so conceited or egotistical as to think that we are in a class with Churchill, still we most respectfully and earnestly maintain that we are fighting for the eternal, unchangeable principles that the inalienable right of a property owner to (1) the protection of his property; (2) that one shall not be deprived of his property without due process of law; (3) that his property shall not be taken for public purposes without just compensation, which are guaranteed to him by both the Federal and State Constitutions, shall be maintained and upheld. In a very real and vital sense we fight, not only for Petitioner's rights, but for the rights of every present and future property owner in Louisville, Kentucky, and, in fact, in all the United States.

3. DECLARATION OF INDEPENDENCE WAS DRAWN BY ABLE, LEARNED AND PATRIOTIC MEN.

While the Magna Charter (1215) and the Bill of Rights (1689) limited and restrained the power and authority of the crown to summarily impose and collect taxes, neither of these great documents limited or restrained parliament from enacting drastic and summary laws for the collection of taxes. The men who drew the Declaration of Independence knew all this. They were men learned in the science of civil government. They were versed in history of civil governments. They were able and patriotic. They knew the unchangeable, inalienable rights of men among which was the protection of property. They were thoroughly familiar with the drastic measures that the British parliament had enacted for the collection of taxes against the colonies.

After enumerating certain inalienable rights, they continued *"that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed." Nowhere can it be found in that instrument that there was an exception to the security of inalienable property rights, namely, except in the collection of taxes, by summary and arbitrary power.*

4. NO EXCEPTION IN FEDERAL OR STATE CONSTITUTIONS.

The framers of both our State and Federal Constitutions did not say that free men should be protected in their inalienable rights in respect to the protection of their property, except in the collection of taxes.

Do governments exist for the protection of inalienable rights of free man in the protection of their property rights, or do people exist for governments to arbitrarily, under the guise of collecting taxes, take their property and convey it to another for a mere pittance, a tax bill?

5. POWER TO TAX—POWER TO DESTROY.

In McCulloch v. State of Maryland, *et al.*, 17 U. S. 316; 4 Wheat 316, 4 L. Ed. 579, at p. 607, Chief Justice Marshall, said:

> "* * * that the power to tax involves the power to destroy."

The arbitrary power conferred on the Tax Receiver by KRS 91.540 is most certainly a power to destroy inalienable property rights.

6. DESTRUCTION OF GOVERNMENT "OF THE PEOPLE, BY THE PEOPLE, AND FOR THE PEOPLE"—(LINCOLN).

Lincoln concluded his famous Gettysburg address in these words—"that this nation, under God, shall have a new birth of Freedom—and that Government of the people, by the people and for the people, shall not perish from the earth."

We respectfully maintain that one of the most potent factors in the destruction or overthrow of a government of the people, by the people and for the people is to uphold summary and arbitrary statutes for the collection of taxes, which utterly disregard the taxpayers' inalienable right to the protection of his property. Due process of law—the right to be heard before his property is taken.

B. KRS 91.540 Authorizes and Empowers the City Tax Receiver to Convey the Fee Simple Title to Private Property for Public Purposes—Namely, for the Collection or Payment of City Taxes—Without Just Compensation and Is Therefore Contrary to Both the State and Federal Constitutions, Hence is Unconstitutional.

1. CITY TAX RECEIVER CANNOT SELL FOR MORE THAN A TAX BILL.

City Tax Receiver under KRS 91.480 cannot sell property for more than the tax bill—Collins v. Lane, 151 Ky. 8, 150 S. W. 977, hence it is impossible for him to give just compensation for property which he sells under KRS 91.480 and conveys under KRS 91.540. Generally speaking, it is common knowledge that the amount of a city tax bill in Louisville, Kentucky is not as much as one-seventieth or one-eightieth of the real value of the property—hence KRS 91.540 is contrary both to the Federal and State Constitutions in that it authorizes the taking of private property and giving it or conveying it to another for public purposes without just compensation.

2. SELLING AND CONVEYING PRIVATE PROPERTY TO COLLECT TAX BILL OR TO PAY A TAX BILL IS SELLING AND CONVEYING IT FOR PUBLIC PURPOSES—THAT IS, COLLECTION OF TAXES.

Section 171 of Kentucky's Constitution reads in part as follows:

> "Taxes shall be levied and collected for public purposes only."

The lower Court in Industrial Development Authority, *et al.* v. Eastern Ky. Regional Planning Commission, 332 S. W. 2d (Ky.) 274 (decided Feb. 12, 1960), said:

> *"Thus, the Constitution of this State requires that taxes shall be exacted and used for public purposes only."*

The only reasonable, logical conclusion that can be drawn is that the sale of private property for tax bills is the taking of said property for public use or purposes.

In the case of C & O Ry. Co. v. City of Silver Grove, 249 S. W. 2d (Ky.) 520 (decided 1952), Silver Grove sought to incorporate under the name of City of Silver Grove. It sought to include sixty-four acres of the C & O Railway Company's yards, etc., solely for the purpose of levying and collecting taxes on the said railroad company's property. The railroad company in pleading to the action, among other things, said "which sixty-four acres are owned by the railway company and can never be adapted to any municipal use . . . it is the purpose and intent of the incorporators of the proposed city, in including the company's yards within the proposed boundary of the city, to subject the company to municipal taxes . . . the inclusion of the real estate within the boundaries of the proposed city will deprive the company of its property by the levy and collection of municipal taxes without any benefits to the company; the company will thereby be deprived of its property without due process of law, in violation of the 14th Amendment to the Constitution of the United States, and Section 2 of the Constitution of Kentucky."

The trial Court ruled against the railroad company and in favor of the proposed municipal incorporators. The Court of Appeals of Kentucky (the lower Court) in reversing the trial Court quoted with approval from one of its former opinions and said:

> *"We think this is a case of taking private property for public use under the form of taxation, and that it is within the prohibitory clause of the Constitution, and therefore unconstitutional and void."*

Now, if the inclusion of property in a proposed boundary for an incorporated city for the purpose of levying and collecting taxes on it is the taking of property by the way of taxation for public use, then most certainly the selling of private property to collect tax bills is taking the property for public use. What are taxes collected for anyhow, but for public use. So when a piece of private property is sold to pay taxes it is taken for public use; it is inescapable.

Neither the Constitution of the State of Kentucky nor the Constitution of the United States read "nor shall private property be taken for public use without just compensation", except for the collection of taxes.

Neither the State nor the Federal Constitutions make any such exception, and we most earnestly and respectfully maintain that no Court can hold KRS 91.540 constitutional without reading into the Constitution an exception which is not there.

C. Due Process of Law, Even in the Collection of Taxes (Neither the Federal Nor the State Constitutions Make Any Exceptions) Means a Notice and an Opportunity to be Heard, Before, *Not After*, Private Property Is Taken.

In the case of the City of Louisville v. Cochran, 82 Ky. (John Rodman) 15, the validity of a statute pertaining to the collection of city taxes was involved. It was held unconstitutional. The lower Court, in that opinion, recognized that to a certain extent summary proceedings were justifiable in the collection of taxes, but even so, the Court said that ministerial offices in the collection of taxes must give the taxpayer an opportunity to be heard.

The lower Court in that case among other things said:

> "* * * It is important that we understand here what is the meaning of 'due process of law', or 'the law of the land.'
>
> "This court said, in Varden v. Mount, Hines, Judge, 78th Kentucky, 89:
>
> "'The meaning of that provision has generally been construed to be a law that hears before condemning, and arrives at a judgment for the divestiture of the rights of property through what is ordinarily understood to be judicial process—the general rules that govern society in reference to the rights of property.' * * *
>
> "It is now generally understood by citizens, as well as courts, that the Legislature has no power

to interfere with title of the citizen to his property, or to interrupt him in its free enjoyment, *much less to transfer it*, against his will, to another, either by express enactment or destruction of the remedies for its defense and protection. * * *

"And while this summary remedy for levying, assessing, and collecting taxes has the plea of necessity and immemorial usage for its support, every dictate of natural justice and the letter and spirit of the constitution require that the citizen shall be warned, and have an opportunity to be heard before he is condemned, or his money or property taken, and secure to him the right to have a judicial hearing upon the existence of an alleged power and the legality of its exercise whenever his constitutional rights are imperiled thereby. * * *

"These authorities, and many others not necessary to cite, may be considered as settling the question that summary process, usually adopted in this and other States for the enforcement of the taxing power, is not contrary to the law of the land, as secured to the citizen by the constitution. But in every case, and under all forms of remedy, the citizen has a right, which must be preserved, to be heard before some tribunal on all questions which are essential to the constitutional protection of his property. The power to levy and collect taxes is an incident of sovereignty, and it belongs to the legislative department, but the exercising of that all-pervading power, like every other governmental power, is so limited that it cannot be arbitrary, and is subject to rules prescribing bounds to the purpose of the levy, and regulating the manner of assessment and collection. The purpose must be

> public, which is usually ascertained by the benefits to flow from the collection of the tax to the public and the consideration which supports the exaction from the citizen. * * *
>
> "For the direct destruction of individual rights by legislative declaration is no less unconstitutional than the enactment of remedies which lead to similar results. (Vanzant v. Waddell, 2 Gerger, 270.)
>
> "And the manner of the exercise of an otherwise just and clear authority may be as usurpatory as an arbitrary assumption, and it is the most insidious method of unauthorized acquisition of power, whose slightest touch should be the instant for pause, and its first and every assertion the occasion for fearless resistance, and the ground of respectful, but determined disregard.
>
> "* * * Thus, while summary process, based upon necessity and immemorial usage, is allowed, and its execution generally and properly confided to ministerial officers, the rights of the citizens are guarded by 'the law of the land' from invasion, in the name of this very summary process itself, and by the unregulated assertion and the unconstitutional assumption of power."

The validity of an act of the Legislature authorizing and empowering the auditor to convey the title by tax deed was involved in Maguiar v. Henry, etc., 84 Ky. 1.

The Court of Appeals of Kentucky said:

> "* * * The laws for the assessment and collection of taxes are necessarily summary in their character. Title is divested by special statute; but it is stricti juris, and must be followed in all ma-

> terial respects. The taxpayer is entitled by the 'law of the land.' to be heard before he is condemned. Magna Charta gave him this right. 'No free man shall be taken or imprisoned, or be disseized of his freehold, or liberties, or free customs, or be outlawed or exiled, or any otherwise destroyed, nor will we pass upon him, nor condemn him, but by lawful judgment of his peers or by the law of the land. We will sell to no man, we will not deny or defer to any man, either justice or right.'
>
> "The Constitution of the United States reechoes this fundamental rule, so early established, by providing that no person shall be deprived of life, liberty, or property, 'without due process of law'; while our State Constitution says, 'nor can he be deprived of his life, liberty or property unless by the judgment of his peers or the law of the land.'
>
> "* * * When a litigant claims rights under the act of an officer he should state the facts which show that the latter had a right to act. A tax deed results from the exercise of a statutory power; and if the necessary preliminary steps are not taken; the power is not created. * * *"

The case of Board of Levee Com. v. Johnson, *et al.*, 178 Ky. 287, 199 S. W. 8, involved the validity of an act (1914) authorizing the assessment and collection of an acreage tax. The act was held unconstitutional, and from that opinion we quote:

> "* * * We need only to say that the substance of them is that 'due process of law', and the 'law of the land' mean when applied to actions, proceed-

ings or prosecutions pending in any court that no citizen shall be deprived of his life, or his liberty, or his property, without reasonable notice and reasonable opportunity to be heard according to the regular and established rules of practice and procedure before judgment is pronounced depriving him of either. Cooley's Constitutional Limitations, 6th ed., page 429; Hutrado v. People of California, 110 U. S. 516, 28 L. Ed. 232; Hagar v. Reclamation District No. 108, 111 U. S. 701, 28 L. Ed. 569; Holden v. Hardy, 169 U. S. 366, 42 L. Ed. 780; Ely v. Thompson, 3 A. K. Mar. 70; Varden v. Mount, 78 Ky. 86; City of Paducah v. Ragsdale, 122 Ky. 425; City of Louisville v. Cochran, 82 Ky. 15; Marshall v. McDaniel, 12 Bush 378. * * *

"It should further be said that the protective principles that find expression in the words 'due process of law' and 'the law of the land', are not confined to strictly court proceedings or to cases or prosecutions pending in a court of justice; but they are broad enough to and do include efforts to take the property of the citizen when the attempt is made to do so under a power lodged by legislative authority in some quasi judicial tribunal such as the city council of a city or a board invested with authority to assess, levy and collect taxes or take property for public purposes. * * *.

"* * *. The collection of taxes under such summary laws is generally and properly confided to ministerial officers. And when the power of levy and assessment is delegated, notice is usually required as to the former and must be given, and an opportunity to be heard allowed as to the latter. And while this summary remedy for levying, assessing and collecting taxes has the plea of necessity and immemorial usage for its support, every dictate of natural justice and the letter and spirit of the constitution require that the citizen shall be warned, and have an opportunity to be heard before he is condemned, or his money or property taken, and secure to him the right to have a judicial hearing upon the existence of an alleged power and the legality of its exercise whenever his constitutional rights are imperiled thereby. * * *

* * * But in every case, and under all forms of remedy, the citizen has a right, which must be preserved, to be heard before some tribunal on all questions which are essential to the constitutional protection of his property." * * *

In General Electric Company v. American Buyers Cooperative, Ky. 316 S. W. 2d 354, an act of the Legislature giving the General Electric the right to fix prices of goods that it sold to retailers, etc., was declared unconstitutional by the Lower Court because it created an arbitrary and absolute power in the General Electric to control contracts and deprive the purchaser of the right of protecting his property. From that opinion we quote briefly:

> "Reasons for holding the nonsigner statute invalid: * * * (6) It offends our constitutional guaranties of a right of personal liberty and private property and allows a citizen to be deprived of his property without due process of law * * * our Bill of Rights declares as one of the 'great and essential principles of liberty and free government' and as 'inherent and inalienable * * * the right of acquiring and protecting property.' Sec-

tion 1, Fifth * * * Supplemental to this property right provision is Section 2 of the Constitution which forbids the exercise of arbitrary power of government over the 'property of free men'."

The lower Court in their opinion of February 2, 1962, in Case 2, very erroneously held that the principles set forth in their opinions in the above mentioned cases, namely, City of Louisville v. Cochran, 82 Ky. 15; Maguiar v. Henry, 84 Ky. 1, and in Board of Levee Commissioners v. Johnson, et al., 178 Ky. 287, 199, page 8, have no application to the case at bar.

The lower Court in those opinions very clearly and definitely stated that due process of law in the taking of private property meant that the property owner *was entitled to a notice and a hearing before—not after—his property was taken.*

We most respectfully insist that those principles apply to the case at bar and to any other case where private property is taken, and that the lower Court erred greatly in not applying them.

We shall in the next succeeding paragraph D conclusively show that the lower Court is in error in not applying the principles of due process of law set forth in the above opinions.

The text writer of American Jurisprudence on Constitutional Law, Volume 12, pages 267 and 268, Section 573 has this to say on due process of law:

> "573. *Essential Elements.*—The essential elements of due process of law are notice and an opportunity to be heard and to defend in an

> orderly proceeding adapted for the nature of the case before a tribunal having jurisdiction of the cause. One of the most famous and perhaps the most often quoted definition of due process of law is that of Daniel Webster in his argument in the Dartmouth College Case, in which he declared that by due process of law is meant 'a law which heard before it condemns; which proceeds upon inquiry, and renders judgment only after trial.' * * *.
>
> "Expressed in other language, the words 'law of the land' or 'due process of law', when used in considering the property rights of individuals, mean summons or notice, such as is ordinarily given upon the institution of a suit, due appearance of the parties in interest, pleading of the facts in issue, and a determination thereof by a jury or by a court in accordance with settled practice. In any proceedings where notice is essential, the view has been taken that the law authorizing such proceedings must require notice; otherwise, it will be unconstitutional."

We could multiply quotations almost indefinitely from recognized legal text writers to the same effect, namely, that due process of law in the taking of private property means that the property owner shall have *notice and a hearing before—not after—his property is taken.*

This Court and the highest courts of practically every State in the Union have held that due process of *law in the taking of private property means notice and a hearing before—not after—the property is taken.*

D. KRS 91.540 Is Contrary to Both the Federal and State Constitutions in That It Takes Private Property Without Due Process of Law, That Is, a Notice and a Hearing Before—*Not After*—the Property Is Taken or Conveyed or Given Away for a Mere Pittance of Tax.

An analysis of KRS 91.540 in connection with KRS 91.560, 91.470, 91.480, 91.490, 91.510, and in connection with the opinions of the lower Court in Interstate Bond Co. v. Williams, 290 Ky. 850, 162 S. W. 2d 770; Brunner v. Bell, Ky. 290 S. W. 2d 461, most certainly and definitely discloses that the taxpayer does not have any notice of the hearing before his property is conveyed under KRS 91.540.

KRS 91.560 grants the City a lien for taxes upon property within its corporate limits. KRS 91.490 confers authority upon Tax Receiver to distrain and sell personal property under KRS 91.470 and to sell real property under KRS 91.480 for the payment of taxes.

KRS 91.470 authorizes him first to distrain and sell personal property if available. KRS 91.480 confers upon him the authority to sell real property, if no personal property is available, for the payment of taxes. KRS 91.510 provides for a redemption within two years and then if not redeemed the purchaser under the conditions stated under KRS 91.540 shall be entitled to a deed in fee simple. The lower Court in the aforementioned opinions and in many others, has consistently held that a deed of the Tax Receiver under KRS 91.540 is absolutely void and conveys no title or interest whatsoever, unless in the sale of the property the mandatory provisions of KRS 91.470 and 91.480 are strictly complied with. We most earnestly contend that KRS 91.540 deprives the property owner of due process of law in this—it authorizes the conveyance of the property without giving the opportunity to *the property owner before—not after—it is conveyed, to be heard on whether or not the Tax Receiver in the sale of the property complied with the provisions of the Statute in reference to the sale thereof.*

As a matter-of-fact the Respondent, the Tax Receiver, Mr. Wetherby who has been Tax Receiver for ten years, never in any sale complied with the provisions of the Statutes above mentioned.

Mr. Wetherby, the City Tax Receiver, was honest. He candidly admitted (1) that he never distrained personal property; (2) that he never held an auction.

> "Q. Mr. Wetherby, since you became the City Tax Receiver for the City of Louisville in 1952, up to the present, have you ever levied upon or distrained personal property of any delinquent taxpayer before you sold the real estate for delinquent taxes?
>
> Mr. Bell: Again enter my objection because he had not alleged in his pleadings any allegations in reference to levying on personal property.
>
> Mr. Hubbard: You decline to answer that?
>
> The Witness: I might answer it, No.
>
> Q. You never have?
>
> A. No. * * *
>
> Q. I'm talking about since you have been Tax

Receiver, you have never distrained on any personal property for any delinquent tax bill?

A. That's right. * * * (Tr. 1, Case 2, pp. 38-39).

Q. Mr. Wetherby, in sales of delinquent tax bills on real estate, you just sit around a table and ask this man and that man if he wants this piece of property or that piece of property, is that right?

A. Yes, sir, that is the way the sale is conducted.

Q. In other words, Mr. Wetherby, you don't auction and say, 'who will bid on this tax bill, so much,' or anything like that?

A. No, sir, I do not.

Q. Let's go over and ask—

A. We only—we only sell for the amount of the taxes due the City. There is no bidding on it.

Q. You just—if you mean that circle around you, ask him if they want this or that?

A. There is probably eight or ten of them there.

Q. I say a few men—

A. Yes, sir, a few.

Q. You just ask which one wants this—

A. That's right."

(See Tr. of Record, Case 2, pp. 37-38)

We mention here the above testimony to emphasize the unconstitutionality of KRS 91.540 in that it takes—conveys private property for the payment of municipal taxes without notice and an opportunity to be *heard, before, not after, the taking as to whether or not the Tax Receiver, in the sale has complied with the mandatory provisions of KRS 91.470 and KRS 91.480;*

and further to emphasize the fact of the privilege of (Brunner v. Bell, 290 S. W. 2d 461) coming into court after his property has been taken, does not render KRS 91.540 constitutional; and to further emphasize the utter futility (as in Case 1 at bar) of trying to recover his property after it has been conveyed. Under a subsequent paragraph .... we shall comment further on this.

E. Default Judgment of October 22, 1956, Case 1, Is Void Because Complaint Did Not State Cause of Action Which Conferred Jurisdiction Upon the Court to Grant It. Hence, Taking of Petitioner's Property Under It, Is Without Due Process of Law and Contrary to Both the Federal and State Constitutions.

(1) THREE CONDITIONS MUST EXIST IN A COMPLAINT TO CONFER JURISDICTION UPON THE COURT TO RENDER A VALID JUDGMENT. IF ANY ONE OF THEM IS ABSENT THE JUDGMENT IS VOID.

There are three conditions or essential elements which must exist in a complaint to confer jurisdiction upon a court to grant a valid judgment. If any one of them does not exist the judgment is absolutely void. They are: (1) jurisdiction of the person, (2) jurisdiction of the subject matter and (3) a complaint that states cause of action. Lowther v. Moss, 239 Ky. 290, 39 S. W. 2d 501; Wagner, *et al.* v. Peoples Building and Loan Association, 292 Ky. 691, 167 S. W. 2d, 825.

(2) WHERE RIGHT OF ACTION IS STATUTORY, PROVISIONS OF STATUTE MUST BE PLEAD OR A JUDGMENT RENDERED ON SUCH A COMPLAINT IS VOID.

Where right is purely statutory, the provisions of the statute must be plead in order to confer jurisdiction to render a valid judgment. If they are not plead the judgment is absolutely void. Penick v. Commonwealth for use and benefit of Barnett, 250 Ky. 86, 61 S. W. 2d 1098; Burkhart v. City of Newport, 265 Ky. 796, 97 S. W. 2d 803. Liberal rules of Pleading under Kentucky Rules of Civil Procedure 8.01 do not relieve anyone from pleading the provisions of the Statute upon or under which he claims his right. Johnson v. Coleman, *et al.*, Ky. 288 S. W. 2d 348; Hodges v. Hodges, Ky. 314 S. W. 2d 208. See also Rule 1 of the Kentucky Rules of Civil Procedure.

(3) RESPONDENT C. C. BRUNNER'S COMPLAINT CASE 1. HIS CAUSE OF ACTION, IF ANY HE HAS IS BASED ON KRS 91.540. IT IS FATALLY DEFECTIVE IN THAT IT DOES NOT SET FORTH THE NECESSARY PROVISIONS OF SAID STATUTE. HENCE THE DEFAULT JUDGMENT OF OCTOBER 22, 1956 IS VOID. IT CONFERS NO RIGHTS. IT IS A NULLITY. IT TAKES PETITIONER'S PROPERTY WITHOUT DUE PROCESS OF LAW.

In order to state a cause of action under KRS 91.540 (for his, C. C. Brunner's cause of action, if any he has, is based upon said statute) it was absolutely necessary, as is hereinabove clearly shown, for Respondent to plead the terms of the statute, namely, (1) that the property had not been "redeemed within the time allowed for redemption" and that he, the purchaser, had paid "all City tax bills or assessments made against the property after the assessment of the taxes for which it was sold, with interest as provided by KRS 91.430." He did not plead the above terms of the statute, in fact the only phrase of the statute that he did plead was that he was entitled to possession. We most seriously and earnestly contend that such a pleading was not sufficient to confer jurisdiction upon the court to render the default or any judgment thereon. Hence the default judgment of October 22, 1956 in Case 1 is absolutely void. Scholl v. Margulis, 215 Ky. 62, 284 S. W. 421; Wolfe County, *et al.* v. Tolson, *et al.*, 283 Ky. 11, 140 S. W. 2d 671. Both Kentucky (Kentucky Rules of Civil Procedures are based upon the Federal Rules) and Federal Rules of Civil Procedure require that a cause of action must be stated in order to confer jurisdiction and this cannot be waived by default. Federal Rule 12 (b), Kentucky Rule 12.02(6) "failure to state a claim upon which relief can be granted." Hence the default judgment of October 22, 1956,

> "A void judgment * * * has no legal or binding force or efficacy for any purpose or at any place. It cannot affect, impair, or create rights. It is not entitled to enforcement and is, ordinarily, no protection to those who seek to enforce it. It may be attacked by a person adversely affected by it, in any proceeding, direct or collateral, and at any time. All proceedings founded on the void judgment are themselves regarded as invalid. In other words, a void judgment is regarded as a nullity, and the situation is the same as it would be if there were no judgment. In accordingly leaves the parties litigant in the same position they were in before the trial." 30A Am. Jur., under Judgments, Sec. 45, pp. 197-199.

(4) TAKING PETITIONER'S PROPERTY BY AND UNDER A VOID JUDGMENT IS MOST CERTAINLY—A TAKING WITHOUT DUE PROCESS OF LAW AND CONTRARY TO SECTION 1 OF THE 14TH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

We do not believe that this statement needs much if any amplification. As hereinabove pointed out, a void judgment is a nullity. It neither confers or takes any rights. Most certainly then the taking of petitioner's property in Case 1 under the void, default judgment of October 22, 1956 is taking his property without due process of law. *He most certainly is entitled to his day in court on a complaint that states cause of action.*

F. Case 1. The Lower Court Erred Greatly in Refusing to Pass Upon the Constitutionality of KRS 91.540 in Case 1 and in Holding "So Richardson's motion Under CR 60.02 Could Not Put in Issue the Question of the Constitutionality of the Statute." The Former Opinions—Richardson v. Brunner, Ky., 327 S. W. 2d 572, and Richardson v. Brunner, Ky., 328 S. W. 2d 154—of the Lower Court Should Also Be Considered in This Connection.

(1) VOID JUDGMENT IS NOT ENTITLED TO ANY RESPECT, HENCE, DOES NOT EFFECT THE QUESTION OF CONSTITUTIONALITY OR UNCONSTITUTIONALITY OF KRS 91.540.

In the next preceding paragraph E, we have clearly shown that the default judgment of October 22, *1956 is void for lack of jurisdiction of the court, and hence it is not res judicata for anything, especially as to the constitutionality or unconstitutionality of KRS 91.540.* The lower court erred greatly in holding that your petitioner did not by motion raise the question of constitutionality of said statute.

(2) THE CASE OF COMMONWEALTH v. JEFFERSON COUNTY, 300 KY. 514, 189 S. W. 2d 604—NOT APPLICABLE CLEARLY DISTINGUISHABLE.

In the Commonwealth v. Jefferson County case *supra,* the Commonwealth before a trial court of general jurisdiction sought to have an Act of the Kentucky Legislature declared unconstitutional. The trial court held it valid. No appeal was taken to the Court of Appeals of Kentucky. Two years later, after the time for an appeal had expired, the Commonwealth instituted an entirely new and separate action, in which it again sought to have the same Act declared unconstitutional. Note there were two separate and distinct actions. Not so in Case 1 at bar. There is only one action in it. The Court of Appeals of Kentucky, the lower court, in the Commonwealth case *supra,* held that the judgment in the first case or first instance was *res judicata* to the second action. In the Commonwealth case *supra,* no right of anyone had been adjudicated. In Case 1, in the same case, the case at bar, a default judgment had been rendered against the petitioner under a statute, which petitioner as hereinabove shown, under paragraphs B, C, and D, is clearly unconstitutional. Kentucky Civil Rule of Procedure 55 and Federal Rule of Procedure 55 (c) pertaining to setting aside default judgments are the same. Kentucky Rule of Civil Procedure 60.02 and Federal Rule of Civil Procedure 60 (b) are the same. In fact, the Kentucky Rules of Civil Procedure are an almost verbatim copy of the Federal Rules. Kentucky Rule 60.02 and the Federal Rule 60 (b) set forth these grounds for setting aside a judgment, especially a default judgment. Petitioner's motion in the same case to set aside the default judgment on the ground that it is and was void because the statute upon which it was based was and is, unconstitutional, did most certainly raise the constitutionality of KRS 91.540 and the lower court's holding to the contrary is erroneous and unsound. If petitioner could not in the same case by motion put the constitutionality of KRS 91.540 in issue, then by the same process of reasoning no litigant could put in issue in the same case any one of the other five grounds, namely,

> "(1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; * * * (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason of an extraordinary nature justifying relief from the operation of the judgment."

By the same process of reasoning a default judgment would be *res judicata* on any one of the above grounds for setting it aside and Rules 55 and 60.02 would be rendered meaningless. The lower court greatly erred in holding otherwise.

(3) INTERNATIONAL HARVESTER COMPANY OF AMERICA v. COMMONWEALTH, 170 KY. 41, 185 S. W. 102.

The Harvester Company case *supra*, by default judgment was fined $1,000.00 for the violation of certain Act of the Legislature of Kentucky which the lower court repeatedly held to be constitutional and not contrary to the Fourteenth Amendment of the Constitution of the United States. This court in International Harvester Company v. Kentucky, 234 U. S. 26, 34 Supreme Court, 853, 58 L. Ed. 1284, reversed the lower court and held that the Acts of the Legislature of Kentucky under which the Harvester Company was fined $1,000.00 by a default judgment was unconstitutional—contrary to the Fourteenth Amendment of the United States Constitution. Notwithstanding, the opinion of this court, the Commonwealth of Kentucky undertook in a civil action *supra*, to collect its default judgment. The Harvester Company contended that the default judgment against it was void because it was based upon a nonconstitutional Act. The lower court, the Court of Appeals of Kentucky sustained the contention of the Harvester Company, hence held said judgment void. From that opinion we quote:

> "Is the judgment erroneous merely, or is it void? The authorities we have had an opportunity to examine all seem to agree that as a general rule all acts done under an unconstitutional law are void and of no effect, and that judgments rendered in the courts, or judicial proceedings under unconstitutional statutes, are void; also that a decision by a court of last resort, that a statute is un-

constitutional, has the effect of rendering such statute absolutely null and void from the date of its enactment and not from the date on which it is judicially declared unconstitutional, 3 Cyc. 804, 805. It also seems to be well settled that the fact that a judgment is rendered by default cannot be taken to cure or waive radical defects going to the authority of the court to enter the judgment or to the foundation of plaintiff's cause of action. 23 Cyc. 751, 752. *In this jurisdiction it has time and again been held, beginning with the earliest decisions, that a void judgment is subject to collateral attack from any person affected by it. Gullett v. Blanton, etc., 157 Ky. 457; Puckett, *et al.* v. Jameson, Sheriff, 157 Ky. 172; Robinson v. Charleston, etc., 123 Ky. 419; Bean v. Everett, 21 Rep. 1790; Carpenter v. Moorelock, 151 Ky. 566.

"Is there any difference between a judgment which is void because the court was without jurisdiction of the subject matter and a judgment based upon a void statute? We think not. In either case the court would be without authority to render the judgment. * * *

"* * * An unconstitutional law is void, and is as no law.

"* * * If the case here presented involved an attempt to enforce satisfaction of a void judgment rendered in a civil action, whether void because the court in which it was rendered had no jurisdiction of the subject matter or because it was founded on an unconstitutional statute, the defendant could, in either event, defeat its enforcement on that ground, or, without awaiting an action by the plaintiff for its enforcement, could himself, under the decisions in this jurisdiction, by suit enjoin its enforcement. If either of such remedies would be available to a party to rid himself of a void judgment rendered against him in a civil action, what valid objection can be urged to his right to resort to them for relief against a void judgment rendered in a criminal or penal prosecution * * *."

Twenty-nine years later the lower court in Commonwealth, *et al.* v. Jefferson County, *et al.*, *supra*, reversed their opinion in th Harvester case, and on January 26, 1962 in Veith, *et al.* v. City of Louisville, *et al.*, Ky. 355 S. W. 2d 295, the lower court held that a judgment of the Jefferson Circuit Court rendered some months before and not appealed, was not *res judicata* of a second action, pertaining to the same statute. We most certainly maintain that the decision in the Harvester Case is sound and that the decision in Commonwealth v. Jefferson County, *supra*, is unsound.

The first sentence of Sec. 19, p. 171 of 30A *Am. Jur.*, reads thus:

> "* * * The limitations inherent in the requirements of due process and equal protection of the law extend to all functionaries of state government, judicial as well as political, so that a judgment may not be rendered in violation thereof. * * *."

The judiciary is bound by and subject to and limited by the limitations, inhibitions and prohibitions of the constitution, just the same as the legislative and executive branches of the government are. In 12 *Am.*

Jur., Sections 473 and 586, pages 137 and 283, the text writer says:

> #473. "The inhibitions of the Fourteenth Amendment include all the departments of state government, the judicial as well as the political. A similar extent is accorded to like state constitutional provisions. A constitutional mandate to maintain equality before the law and equal laws rests upon the judicial department of government with as much force as upon the other departments. * * *
>
> "* * * All governmental agencies authorized by the state, particularly municipal corporations, are within the purview of the clause.
>
> "#586. Generally.—The requirements of due process of law extend to every case of the exercise of governmental power. The limitations inherent in the requirements as to due process of law are binding equally on the United States and on the several states.
>
> "A state may not by any of its agencies, legislative, judicial, or executive, disregard the constitutional prohibition. This inhibition includes all functionaries of state government, judicial as well as political.
>
> "* * * Where rights are acquired by a citizen under the existing law, there is no power in any branch of the government to take them away except by due process of law. The purpose of this clause is to exclude arbitrary power from every branch of the government. So far, at least, as the Fourteenth Amendment is concerned it is a restraint on the legislative, executive, and judicial departments of the state. It seems undoubted that the people of a sovereign state in drafting and

adopting a state Constitution are bound to respect these limitations equally with the legislative and other departments of government acting under such Constitution.

"The object of the constitutional guaranty of due process of law is to preserve personal and property rights against the arbitrary action of public officials."

We most certainly maintain that if this Honorable Court holds that a judgment, especially a default judgement rendered under a non-constitutional Act that deprives a person of his property without due process of law and without just compensation, is binding and cannot be collaterally attacked as void, we had just as well throw away our constitutions as mere scraps of paper.

(4) RALPH RICHARDSON v. C. C. BRUNNER, KY. 327 S. W. 2d 572. CASE 1 AT BAR.

We make three observations on the above opinion, (1) the case of Dant v. Progress Paint Mfg. Co., Ky. 309 S. W. 2d 187, upon which the lower court based their opinion is clearly distinguishable and not applicable to the case at bar. In the Dant case, Dant had a lawyer. He not only had a lawyer but the trial court informed him and his lawyer that he must take proof on depositions and have it in within a certain time. Instead of doing that Dant ignored the Court's orders, discharged his then attorney and employed another attorney who completely ignored the Court's orders. Of course there was no excuse for such conduct. In the case at bar, Case 1, however, your petitioner Richardson did not have an attorney—(see his affidavit, Tr. 1, Case 1, p. 50) and could not empty one because he could not raise the money to do so. (2) The lower court in Case 1 abused a sound discretion. The lower court has repeatedly declared that default judgments are not favored and should be set aside, especially when motion is seasonably made and a meritorious defense presented.

In the case of Carr Creek Community Center v. Home Lumber Company, 276 Ky. 840, 125 S. W. 2d 777, there was a long extended litigation. ALL PARTIES HAD COUNSEL. Yet, nothwithstanding, the parties had counsel, there was a default judgment against some of the parties. The trial Court overruled motions to vacate the default judgment and the lower court reversed the trial court. From that opinion we quote:

> "A prerequisite to the exercise of the rule laid down by the Courts, in passing on motions to vacate default judgment, it must appear that the movant is able to present a valid defense, * * * on the whole case, after giving it the most careful attention, we express the opinion that the Court below should have set aside the judgment of December 12, and permitted the appellant to plead. The Court, in the exercise of that broad discretion manifested by our holdings in the cases cited, would have met the ends of justice in granting a new trial. * * * Judgment reversed and cause remanded for new trial consistent with this opinion."

In the case of Strother, *et al.* v. Day, *et* al., (Ky.). 248 S. W. 2d 347, a suit was filed by one Strother and others to cancel a contract of transfer to the defendants, Herbert R. Day, *et al.,* some personal estate and a deed. The defendants filed a pleading styled "Special Demurrer and Answer." No reply having been filed, sometime thereafter, a default judgment was rendered in favor of the defendants. A motion was seasonably made to set aside the default judgment. The trial Court overruled this motion. On appeal to lower Court, the case was reversed. From that opinion we quote:

> "It seems to us that the Court should have vacated the default judgment upon plaintiff's motion. *It is familiar law that default judgments are not looked upon with favor if the party against whom they go was in any way thrown off guard or mislead and shows at the same term of the court that he has a meritorious defense.* Vanover v. Ashley, 298 Ky. 722, 183 S. W. 2d 944; Kidd v. B. Perina & Sons, 313 Ky. 727, 233 S. W. 2d 255."

In Carr, *et al.* v. Brownfield, (Ky.) 255 S. W. 2d 623, the Carrs obtained a default judgment against Brownfield on an alleged breach of contract relating to making certain repairs on Carr's residence. Both parties had attorneys. There was a default judgment in the favor of the Carrs. A motion was seasonably made to set it aside, which motion evidently showed a valid defense and the trial Court sustained it.

The trial Court, notwithstanding the careless failure of both defendant and his counsel in that case (petitioner in the case at bar did not have counsel) in failing to make some defense; set aside the default judgment because the defendant presented a meritorious defense and, on appeal to the lower Court, the trial Court's order setting aside default judgment was sustained. Among other things, the lower Court said:

> "There is no escape from the conclusion that both Brownfield and his attorney were careless in failing to make some defense to Carr's suit."

In the comparatively recent case (October 4, 1957) of Bargo v. Ray C. Lewis, Judge, (Ky.) 305 S. W. 2d 757, it appears that Bargo had obtained a default judgment against the Metropolitan Life Insurance Company. An attorney in Lexington, Kentucky representing the Metropolitan Life Insurance Company had attempted to employ an attorney in Barbourville, Kentucky to secure an extension of time for answering the complaint and the Barbourville attorney didn't understand his employment. Hence, upon a failure to answer there was a default judgment. A motion was seasonably made to set it aside and the above-styled action was originated in the lower Court to prohibit the trial judge, Judge Lewis, from entering an order setting aside said default judgment. The lower Court denied the petition for a write of prohibition and concluded their opinion in the following language:

> "The situation, therefore, was one in which the Lexington attorney thought that he had arranged with the Barbourville attorney to obtain an extension of time for answering and the latter thought

he was to be concerned only with the trial of the case. In these circumstances, we cannot say that the Circuit Court Judge abused his discretion in finding that the default was the result of inadvertence or excusable neglect. See CR 55.02, 60.02; Rosen v. Galizio, 184 Ky. 212 S. W. 104. *Default judgments are not favored, and it appears from the tendered answer that the defendant has meritorious defenses."*

The text writer of Am. Jur., 30A, Sec. 636, page 609, has this to say on setting aside default judgment, to-wit:

> "Under the tendency of the courts to require causes of action to be tried upon the merits, judgments by default are regarded as peculiarly within the rule conferring authority on courts to open, correct, or vacate their own judgments. The provisions of statutes for the opening or vacation of default judgments are liberally construed and, although the setting aside of such a judgment is ordinarily within the discretion of the court, in a case of reasonable doubt such discretion is usually exercised in favor of granting the application so as to permit a determination of the controversy upon the merits."

We respectfully and vigorously maintain that the lower Court abused a sound discretion in their first opinion in the case at bar in declining to apply the principles set forth in their opinions above mentioned. The lower Court erred greatly.

In the third place the lower Court declined to apply their own principles, especially in Brunner v. Bell, Ky.

290 S. W. 2d 461. In that case and many other cases, the lower Court held that if the Tax Receiver had not complied in the sale of the property with the mandatory provisions of KRS 91.470 and 91.480 then his deed was void. In the case at bar Case 1, your petitioner made a seasonable motion to set aside the default judgment and supported it by an affidavit (see Tr. 1, Case 1, pp. 17, 19-23) to the effect that he had ample personal property subject to distraint to pay the taxes. He made subsequent motions and attempted to file a counterclaim which set out a perfect defense which the Court refused to permit him to file and supported his motion to file it with a supporting affidavit (Tr. 1, Case 1, pp. 36-51).

The lower Court erred greatly in not applying the principles in Brunner v. Bell, *supra,* to the case at bar.

G. Case 2 Involved Herein.

The lower Court erred greatly in holding that KRS 91.540 was constitutional because the petitioner could come in after his property was taken and have a hearing.

(1) In their opinion the lower Court among other things said:

> "Judgment was entered dismissing the action on the ground that the complaint as amended failed to state a claim on which relief could be granted.
>
> "* * * It is significant that the pleadings do not allege any actual failure of the tax authorities

> to comply with the statutory requirements relating to levy, sale and redemption, in regard to Richardson's tract of land."

The lower Court erred greatly in the above statements. Your petitioner most certainly stated the cause of action for declaration of rights under KRS 418.040, 418.045 and KRS 418.050 (see Tr. 1, Case 2, pp. 5-12; see Appendix 4, pp. 79-80).

He stated clearly and definitely that an actual controversy existed between him and the Respondent, C. C. Brunner as to whether or not KRS 91.540 was constitutional and as to whether or not the Tax Receiver could convey his property to the Respondent, C. C. Brunner under said statute. George v. Bernheim Distilling Company, 300 Ky. 179, 188 S. W. 2d 321. He was not in that complaint trying to raise the question of failure of the Tax Receiver to comply with the statutory requirements relating to sale so it was not necessary for him to allege those things.

In their opinion in Case 2 the lower Court said that that there was no merit in your petitioner's contention that he was entitled to a notice and hearing before his property was conveyed under KRS 91.540 because he could have a hearing after his property was taken.

We think that we have most certainly and clearly *shown that due process of law requires a hearing before, not after, the taking of property.*

The lower Court said that petitioner's second ground of attack, namely, that the Tax Receiver or the Respondent, if guilty of any conduct misleading the taxpayer (your petitioner) as to his right of redemption, was without merit because the lower Court would provide appropriate relief. In all due respect we most vigorously and boldly assert that in Case 1 for over five years, your petitioner has been urging relief on this ground which both the trial Court and the lower Court have denied him.

The lower Court said that your petitioner's third ground of attack, namely, that it was taking his property for public purpose, was without merit and obviously fallacious. The Court continues and says

> "The statutes call for a public sale, upon adequate notice, thus providing reasonable assurance of the property bringing a fair price, and a reasonable redemption period is prescribed."

How grievously the lower Court errs in such statements. The Kentucky Statutes do not permit the sale of real estate for more than the tax bill.

Then the Court continues:

> "if in fact a particular piece of property is sold for a grossly inadequate price perhaps the taxpayer might be entitled to some form of equitable relief, assuming he could show an adequate excuse for not having exercised his right of redemption."

My God! My God! we say it reverently—yes, even in agony of spirit. How can the lower Court in the face of this record make such a statement and in the face of the fact that the Tax Receiver is not allowed to sell the property for more than the tax bill, interests, penalties and costs. For over five years your petitioner has urged the trial and lower courts to grant him relief and showed that his property worth between $20,000.00 and $25,000.00 is being taken for approximately $1,200.00 or less. Frankly and candidly and in all due respect to the lower Court we are unable to understand why sitting in a court of equity, it would make such a statement and ruling in the face of this record.

The Court continues:

> "the possibility that such a sale might occur is not a ground for holding the statute unconstitutional."

It is not only a possibility but in fact it is common knowledge that no tax bill on realty in the City of Louisville, Kentucky, is sold for more than the taxes, interests, penalties and costs which is always far less than the real value of the property. Hence two years after the sale the Tax Receiver under KRS 91.540 is authorized to convey the fee to the purchaser at the sale without giving the taxpayer a notice and an opportunity to be heard as to whether or not the Tax Receiver in the sale complied with all the statutory requirements of KRS 91.470 and KRS 91.580.

Furthermore, it is unconstitutional because it is taking property—payment of taxes for public purposes without just compensation. The lower Court concludes, "The statute provides adequate means by which the rights of the taxpayer may be protected."

We most respectfully assert that these two cases alone show the utter failure of the statute to provide protection for the taxpayer.

It is most certainly taking his property without due process of law and contrary to Section 1 of the Fourteenth Amendment of the Constitution of the United States and it is certainly taking his property for public purposes without just compensation—taxes are collected for public purposes and when property is conveyed in payment of a tax bill it is taking it for public purposes, without just compensation contrary to the Fifth Amendment of the Constitution of the United States.

H. Erroneous Reasoning of the Lower Court.

In all due respect, we say it frankly and candidly, we are at a loss to understand or comprehend the reasoning of the lower Court. They say in the face of their own opinions and in the face of the opinions of most every court of last resort in the United States and in the face of the great, vast majority of text writers, that due process of law does not necessarily *mean notice and a hearing before property is taken but that it may be due process of law, if after the taking the taxpayer might possibly recover his property. How the lower Court can say if a court of Equity might grant relief if a particular piece of property was sold for a grossly inadequate price when it has denied your petitioner relief in these cases; we are unable to understand.*

In the face of this record we are unable to follow the reasoning of the lower Court in this statement, "Statute provides adequate means by which the rights of the taxpayer may be protected." The statute has not only not protected your petitioner's rights but has deprived him of them.

In Case 1 at the bar the petitioner not only made timely motions to set aside the default judgment supported by an affidavit, but also tendered an answer and counterclaim supported by a supplemental affidavit which presented a complete defense and which under the lower Court's opinion, in Brunner v. Bell, Ky. 290 S. W. 2d 461, would have granted him relief, and why! Oh why! did the trial and lower Court deny relief we are unable to understand! And, in the face of all of this the lower Court says that KRS 91.540 is constitutional.

I. Collection of Taxes—Necessity—Civil Rights.

(1) COLLECTION OF TAXES.

We are not opposed to the collection of taxes and realize the necessity of it but we most vigorously and earnestly maintain that taxes can and should be collected without violating the taxpayer's constitutional right to due proces and law, namely, a notice and a hearing and without taxpayer's constitutional right not to have his property taken for public purposes without just compensation.

(2) NECESSITY.

Governments as usually understood, we believe in America and in Anglo-Saxon countries, are established by the people and for the people to maintain their inviolate rights—their inalienable rights—not to destroy them. Among said inalienable rights are the right to ownership and protection of private property. The necessity of collecting taxes should be subordinate to the interest of maintaining these inalienable rights. We should not through the plea of necessity in the collection of taxes destroy these rights. As above stated, taxes can be collected without so doing. In other words, the necessity of protecting these inalienable rights should outweigh the necessity of collecting the taxes.

(3) CIVIL RIGHTS.

In the last two or three decades there have been millions and millions of both spoken and written words about Civil Rights in America, especially the civil right to vote. They have been spoken and written by all races and colors—they have been spoken and written by people in every vocation in life. But there has not been very much said about the civil rights of property owners to the protection of their property rights against the taking thereof without due process of law in the collection of taxes, and against the taking thereof for public purposes without just compensation, in the collection of taxes. We very vigorously contend that it is high time that these rights be protected.

J. Conclusion.

For reasons hereinabove set forth your petitioner most respectfully maintains: (1) that his property in both cases was taken without a notice and a hearing and without due process of law, and that KRS 91.540 is unconstitutional and contrary to Section 1 of the Fourteenth Amendment of the Constitution of the United States, (2) that his property in both cases was taken for public purposes without just compensation under KRS 91.540 and that said statute is therefore void and contrary to the Fifth Amendment of the Constitution of the United States, (3) that his property was taken under a void judgment which conferred no rights and is without due process of law.

We most vigorously and earnestly maintain that KRS 91.540 cannot be held constitutional without reading exceptions which are not in them, into both the Federal and State Constitutions. In other words, the Court must hold that private property cannot be taken without due process of law (which means a notice and a hearing ***before, not after,*** *the taking) except in the* ***collection of City taxes and the Court must hold that*** *private property cannot be taken for public purposes without just compensation except in the collection of* ***City taxes.***

We therefore most respectfully request this Honorable Court to grant this petition for a Writ of Certiorari to the Court of Appeals of Kentucky and to reverse the lower Court, with instructions to hold KRS 91.540 unconstitutional and the default judgment of October 22, 1956 void.

Very respectfully submitted,

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APPENDIX I.

COURT OF APPEALS OF KENTUCKY

RENDERED MARCH 6, 1959

RALPH RICHARDSON, - - - - - - Appellant,

v.

C. C. BRUNNER, - - - - - - - - Appellee.

Appeal from the Jefferson Circuit Court,
Chancery Branch, First Division,
Honorable Macauley L. Smith, Judge.

OPINION OF THE COURT BY JUDGE BIRD—AFFIRMING; REHEARING DENIED OCTOBER 16, 1959.

This action involves the title to real property.

On October 22, 1956, a default judgment was entered against Ralph Richardson in favor of C. C. Brunner.

On November 23, 1956, Richardson filed a motion to vacate the default judgment under CR 55.02 and 60.02(1-3-6). Various affidavits were filed in support of the motion and against it. The motion was heard and overruled by order on December 3, 1956. On December 28, 1956 Richardson filed a notice of appeal by which he appealed from the order of December 3, 1956, refusing to vacate the default judgment.

On March 11, 1957, Richardson filed another motion under CR 55.02 and 60.02(1-3-6) to vacate the default judgment of October 22, 1956, and the order of December 3, 1956, overruling his first motion to vacate under CR 55.02 and 60.02(1-3-6). This second motion of March 11, 1957, to vacate was overruled on March 15, 1957, and on the same day he filed his notice of appeal from the ruling on the second order denying relief under CR 55.02 and 60.02(1-3-6).

On March 22, 1957, Richardson filed a third motion to vacate under CR 55.02 and 60.02(6) which sought to vacate all previous judgments and orders refusing relief under CR 55.02 and 60.02. This order was overruled on March 22, 1957, the day it was filed. Notice of appeal from that order was filed on the same day.

Richardson has appealed from each of the three orders denying him relief under CR 55.02 and 60.02(1-3-6).

We shall discuss the appeals in the same order in which they were taken. The rules relied upon read as follows:

55.02

> "For good cause shown the court may set aside a judgment by default in accordance with Rule 60.02."

60.02

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason of an extraordinary nature justifying relief from the operation of the judgment. * * *"

[1-3] Let us consider the first motion to vacate under CR 60.02. For the purpose of this discussion we shall as-

sume that the defendant, Richardson, had a valid defense. While highly questionable we shall likewise assume that he properly defined that defense in his motion. This does not of itself entitle the defendant to the relief sought. He must explain why he did not present that defense upon the trial and thus excuse his default. Dant v. Progress Pain Mfg. Co., Ky., 309 S. W. 2d 187.

Let us consider his reasons for not defending:

(1) He says that Brunner's counsel so misrepresented certain facts to him that "he had given up all hope of saving his property" to which Brunner held a tax deed. There were some negotiations between Richardson and Brunner's counsel but the record shows that these negotiations occurred almost a year before the suit was filed. The record also discloses an affidavit by Brunner's counsel in which it is specifically sworn as follows: "There were no misrepresentations made to the said Ralph Richardson, he was merely told what Mr. Brunner would take to reconvey the property to said Richardson." If representations made long before the filing of the action may be considered within the purview of CR 60.02, the court nevertheless had sufficient evidence upon which to determine the issue against Richardson and find that there was no misrepresentation or misconduct on the part of Brunner or his counsel. We would therefore not disturb the determination of the trial court.

(2) He says that he couldn't defend the action because of his inability to pay an attorney to represent him. However, the record shows that he did procure an attorney shortly after the default judgment was taken. He does not undertake to say that he did not have the same resources before the default judgment as after. In fact, the record discloses that he owned property other than that involved in this action. The record also shows that, during the year in which this action was originally filed he was collecting

rent. The record shows that he had from May until late October to make arrangements for counsel. There is sufficient evidence in the record upon which the court might determine that Richardson was able to employ counsel, and there is nothing in this motion to show that he tried to employ counsel.

(3) Finally he gives his ignorance and illiteracy as an excuse for not defending the action. He may be uneducated but the record, words to the contrary notwithstanding, shows Richardson to be a rather intelligent person. The record discloses that he knew enough to seek advice of counsel on matters about which he was uninformed. He did that before the action but there is nothing in his motion or affidavit to show that he sought advice after the action was filed.

Any action under CR 60.02 addresses itself to the sound discretion of the court and the exercise of that discretion will not be disturbed on appeal except for abuse. Fortney v. Mahan, Ky., 302 S. W. 2d 842. The record fully authorizes the trial court's finding and conclusion. It is therefore the opinion of this Court that there has been no abuse of discretion and that the judgment of the trial court on the first motion should be affirmed.

In the second and third motions Richardson makes the bare assertion that he is moving under CR 60.02 and states not a single fact upon which he may base his right to use the rule for relief. Facts are stated which may have been quite pertinent to a defense of the original action but none are asserted either in the motion or by supporting affidavit to show why he was prevented from asserting those facts in the original action. In other words there is nothing in either of the motions which tends to explain the default. In Dant v. Progress Paint Mfg. Co., Ky., 309 S. W. 2d 187 we explicitly held that, under those conditions, the moving party is presumed to have no explanation. The showings made in the second and third motions are wholly insufficient and the trial court was correct in denying the relief sought.

For the reasons stated each of the three orders of the trial court are affirmed.

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APPENDIX II.

COURT OF APPEALS OF KENTUCKY

OCTOBER 23, 1959

RALPH RICHARDSON, - - - - - - - - Appellant,

v.

C. C. BRUNNER, - - - - - - - - Appellee.

Appeal from the Jefferson Circuit Court,
Honorable Macauley L. Smith, Judge.

OPINION OF THE COURT BY JUDGE STEWART—AFFIRMING.

The appeal now before us grows out of a fourth attempt by motion to vacate a default judgment, pursuant to CR 55.02 and CR 60.02(4), on the ground that it was void ab initio. This appeal was taken from the order overruling the motion. The judgment was rendered on October 22, 1956, against appellant, Ralph Richardson, in favor of appellee, C. C. Brunner, in the Jefferson Circuit Court. It vested Brunner with fee simple title to certain real estate in Louisville which Richardson claimed he owned.

The other three motions which sought the same relief on the same ground were overruled and, on an appeal to this Court from the order entered, were all dealt with in an opinion styled Richardson v. Brunner, Ky., 327 S. W. 2d 572. The facts are fully set forth in the opinion and we shall not repeat them. We there held that the three motions were properly overruled.

Although the above opinion does not specifically state that the judgment rendered in the original action was a valid one, such a determination in this respect may be plainly inferred from the refusal of this Court to uphold any of appellant's contentions on the former appeal, with the result that the judgment was left undisturbed. However, in order to dispel any doubt that may now exist on this point, we unequivocally hold the judgment must stand as entered in the lower court.

The instant motion undertakes to relitigate, as did the other three motions, the same issue between the same parties as regards the same subject matter, namely, that the judgment is a nullity so that Richardson still owns the property, but it is our view this issue has been finally and conclusively adjudicated. In other words, the doctrine of res judicata applies and bars any further litigation of this issue.

Wherefore, the judgment is affirmed.

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APPENDIX III.

COURT OF APPEALS OF KENTUCKY

FEBRUARY 2, 1962

RALPH RICHARDSON, - - - - - - Appellant,
v.
C. C. BRUNNER, ET AL., - - - - - Appellees,
and
RALPH RICHARDSON, - - - - - - Appellant,
v.
C. C. BRUNNER, - - - - - - - Appellee.

Consolidated Appeals from Jefferson Circuit Court,
Chancery Branch, First Division,
Hon. Macauley L. Smith, Judge.

OPINION OF THE COURT BY COMMISSIONER CULLEN—AFFIRMING.

These consolidated appeals are from judgments in two separate cases. One appeal is from a judgment overruling a motion by appellant Richardson under CR 60.02 to set aside a previous judgment in an action in which appellee Brunner was plaintiff and Richardson was defendant, involving a tax title to a tract of real estate in Louisville. The other appeal is from a judgment dismissing an action brought by Richardson against Brunner, involving another tract of real estate for which Brunner held a tax deed. For convenience we shall designate the appeals as Case No. 1 and Case No. 2.

Case No. 1

On October 22, 1956, in an action brought by Brunner against Richardson, a default judgment was entered against Richardson, adjudging that Brunner had valid title to a certain tract of land in Louisville by virtue of a deed issued under KRS 91.540 upon a sale of the land for city taxes owed by Richardson. Four successive motions by Richardson under CR 55.02 and 60.02, to set aside that judgment, were overruled by orders of the circuit court and those orders were affirmed by this Court. See Richardson v. Brunner, Ky., 327 S. W. 2d 572; Richardson v. Brunner, Ky., 328 S. W. 2d 154. The instant appeal is from a judgment overruling a fifth motion by Richardson under CR 60.02.

The ground of the fifth motion was that KRS 91.540, under which the tax deed was executed to Brunner, is unconstitutional, for which reason, it is claimed, the judgment is *void*. This ground is without merit because it is the rule in Kentucky, and the virtually unanimous rule of other jurisdictions, that a judgment based upon or rendered under an unconstitutional statute is not void. Commonwealth v. Jefferson County, 300 Ky. 514, 189 S. W. 2d 604; 30 Am. Jur., Judgments, sec. 19, p. 172. So Richardson's motion under CR 60.02 could not put in issue the question of the constitutionality of the statute.

The judgment overruling the motion was proper.

We deem it appropriate to make the comment that there may be some ultimate limit in law upon the number of motions that may be filed to set aside a judgment under CR 60.02.

Case No. 2

The second case concerns a different tract of land from that involved in Case No. 1. In 1958 Brunner received a city tax deed for this tract, under KRS 91.540, following a sale of the tract for delinquent 1956 taxes owed by Richardson. Action was brought by Richardson against Brunner and others, seeking a declaration that KRS 91.540 is unconstitutional and an adjudication that Richardson had title to the tract subject only to a lien in favor of Brunner for the delinquent taxes, penalties and interest. Judgment was entered dismissing the action on the ground that the complaint as amended failed to state a claim on which relief could be granted.

Richardson asserted three grounds of unconstitutionality of the statute: (1) It violates various rights of the taxpayer and various constitutional provisions because it authorizes the city tax receiver to execute a deed conveying absolute fee simple title to the purchaser at the tax sale, without affording the taxpayer a hearing *before* execution of the deed on the question of whether all of the requirements of the statutes relating to levy, sale and redemption have been complied with; (2) it would permit the tax receiver to convey a fee simple title even though he had given the taxpayer false or misleading information so as to cause the taxpayer to fail to exercise his right of redemption; (3) it authorizes the execution of a tax deed even though the purchase price at the tax sale was considerably less than the value of the land, thus amounting to a taking of property for a public purpose without paying just compensation, in violation of Sections 13 and 242 of the Kentucky Constitution.

It is significant that the pleadings do not allege any actual failure of the tax authorities to comply with the statutory requirements relating to levy, sale and redemption, in regard to Richardson's tract of land.

It is our opinion that the first ground has no merit, because the firm construction of KRS 91.540 has been that a deed executed under it is not valid unless the proceedings for the sale of the property were in compliance with all statutory requirements. See Interstate Bond Co. v. Williams, 290 Ky. 850, 162 S. W. 2d 770; Brunner v. Bell, Ky., 290 S. W. 2d 461. Under our decisions the taxpayer is not deprived of an opportunity to question the validity of the proceedings *after* the deed is executed.

Since the deed does not foreclose all rights of the taxpayer, there is no provision or principle of the Constitution that requires he be given opportunity for a hearing *before* rather than after the deed is executed.

The cases relied upon by the appellant, such as City of Louisville v. Cochran, 82 Ky. 15, and Maguiar v. Henry, 84 Ky. 1, involved *curative* statutes which undertook to deprive the taxpayer of substantial defenses and to prevent him ever from raising certain issues concerning the validity of the tax proceedings. There is no such deprivation or prevention here.

Board of Levee Commissioners v. Johnson, 178 Ky. 287, 119 S. W. 8, also relied upon by the appellant, likewise is not applicable because it dealt only with the right of the taxpayer to be heard before the *assessment* of a tax. It is no authority for the proposition that the taxpayer must be given a hearing after sale for delinquency and before execution of the tax deed.

By way of clarification, we perhaps should point out that the statute here in question does not prevent the taxpayer from questioning *in court* the validity of the tax sale proceedings either before or after the execution of the tax deed. What Richardson complains of is that the statute does not specifically provide for a hearing before the *tax authorities* before the deed is executed. In our opinion the Constitution does not require such a provision. The statutes contain adequate provision for notice of the tax sale.

The second ground of attack upon the statute also is without merit. If the tax receiver were guilty of conduct misleading the taxpayer in such a way as to cause him not to exercise his right of redemption the courts would provide appropriate relief. Brunner v. Bell, Ky., 290 S. W. 2d 461, relied upon by the appellant, does not suggest otherwise. In fact, in that case the tax deed was held void because of a failure of the tax authorities to comply strictly with the statutes.

The third ground of attack is based upon the premise that a sale of land for delinquent taxes constitutes a taking for a public purpose. This premise obviously is fallacious. The sale is nothing more than a step in the foreclosure of a lien imposed under the taxing power. The statutes call for a public sale, upon adequate notice, thus providing reasonable assurance of the property's bringing a fair price, and a reasonable redemption period is prescribed. If in fact a particular piece of property is sold for a grossly inadequate price perhaps the taxpayer might be entitled to some form of equitable relief, assuming he could show an adequate excuse for not having exercised his right of redemption. But the possibility that such a sale might occur is not a ground for holding the statute unconstitutional. The statute provides adequate means by which the rights of the taxpayer may be protected.

The judgments on both appeals are affirmed.

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APPENDIX IV.

CONSTITUTION OF UNITED STATES.

AMENDMENT V.

No person shall * * * be deprived of * * * property, without due process of law; nor shall private property be taken for public use without just compensation.
USCA, Constitution and Amendments, Amendment 5, page 297;

AMENDMENT XIV.

Section I.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immuities of citizens of the United States; nor *shall any State deprive any person* of life, liberty, *or property, without due process of law;* nor deny to any person within its jurisdiction the equal protection of the law.
USCA, Constitution and Amendments, Amendment 14, Section 1, pages 3 and 4.

CONSTITUTION OF KENTUCKY.

BILL OF RIGHTS.

That the great and essential principles of liberty and free government may be recognized and established. We declare that:

Sec. 1. Inherent and inalienable rights.—All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned: * * *

5. The right of acquiring and protecting property. * * *

Sec. 2. Absolute power does not exist in a republic.—Absolute and arbitrary power over the lives, liberty and property of free men exists nowhere in a republic, not even in th largest majority.

Sec. 11. * * * nor can he be deprived of * * * property, unless by the judgment of his peers or the law of the land; * * *

Sec. 13. Jeopardy; property not to be taken without compensation.— * * * nor shall any man's property be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him.

Sec. 14. Courts to be open and speedy trial guaranteed. —All courts shall be open and every person, for an injury done him in his land, * * * shall have remedy by due course of law, and right and justice administered without sale, denial or delay.

Sec. 26. Bill of rights to remain inviolate.—To guard against transgression of the high powers which we have delegated, we declare that everything in this Bill of Rights is excepted out of the general powers of government, and shall forever remain inviolate; and all laws contrary thereto, or contrary to this Constitution, shall be void.

Sec. 27. Legislative, executive, and judicial departments.—The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to-wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another.

Sec. 59. Limitations upon.—The general assembly shall not pass local or special acts concerning any of the following subjects, or for any of the following purposes, namely: * * *

(12) Legalizing invalid instruments. To give effect to invalid deeds, wills or other instruments. * * *

Sec. 171. Levy and collection of taxes by general laws; public purposes only; uniform within the class and territory; classification of property; bonds of state and its divisions exempt; referendum of laws classifying property; provisions for.—The general assembly shall provide by law an annual tax, which with other resources, shall be sufficient to defray the estimated expenses of the Commonwealth for each fiscal year. Taxes shall be levied and collected for public purposes only * * *

Sec. 242. Private property; taking of for public purposes; appeal; trial by jury.—Municipal and other corporations, and individuals invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured or destroyed by them; which compensation shall be paid before such taking, * * *

Baldwin's Kentucky Revised Statutes, Annotated 1955 Edition—Constitution of the Commonwealth of Kentucky, pages 1, 2, 7, 10, 12, 15, 24, 76 and 103.

JUDICIARY AND JUDICIAL PROCEDURE.

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28 USCA

Section 1257, Page 88, 1949 Edition.

1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * * * * * *

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

RULES OF CIVIL PROCEDURE, FEDERAL.

RULE 12.

* * * * * * *

(b) How presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: * * * (6) failure to state a claim upon which relief can be granted, * * *.

(h) Waiver of Defenses. A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he had made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, * * *
28 USCA, Federal Rules of Civil Procedure, 1960 Edition, pages 13, 14 and 15.

RULE 55.

Default.

* * * * * * *

(c) Setting Aside Default. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60 (b). * * *
28 USCA, Federal Rules of Civil Procedure, 1960 Edition, pages 288 and 289.

RULE 60.

Relief from Judgment or Order.

* * * * * * *

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding of the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; * * * (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; * * * (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. * * *

28 USCA, Federal Rules of Civil Procedure, 1960 Edition, pages 121 and 122.

RULES OF CIVIL PROCEDURE OF KENTUCKY.

RULE 1. Scope of Rules. These rules govern the procedure and practice in all courts of this State, except original actions in the Court of Appeals, in all actions of a civil nature whether cognizable as cases at law or in equity, with the exception that they do not govern procedure and practice in any special statutory proceeding insofar as they are inconsistent or in conflict with the procedure and practice provided by the applicable statute. They shall be construed to secure the just, speedly, and inexpensive determination of every action.

RULE 8.01. Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief and (2) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

RULE 12.02. How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion; * * * (6) failure to state a claim upon which relief can be granted, * * *.

RULE 12.08. Waiver of Defenses. A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, * * *.

RULE 55.02. Setting Aside Default. For good cause shown the court may set aside a judgment by default in accordance with Rule 60.02.

RULE 57. Declaratory Judgments. The procedure for obtaining a declaratory judgment pursuant to statute shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.

RULE 60.02. Mistake; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; * * * (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; * * * (6) any other reason of an extraordinary nature justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this rule does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant constructively served as provided in Rule 4.10, * * *.

Kentucky Rules of Civil Procedure, 1953 Edition, pages 1, 13, 19, 20, 22, 83, 89.

(h) Waiver of Defenses. A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to join an indispensable party, and

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SECTIONS OF KENTUCKY STATUTES.

91.470 (3001) Sale of personal property for city taxes.

(1) Except as provided in KRS 91.550, the tax receiver shall, immediately upon the filing of the lists of unpaid tax bills, distrain the personal property owned or in the rightful possession of the taxpayer, notwithstanding the existence of any lien, except the lien for state taxes, upon the property, and may proceed to sell the title of the taxpayer in a sufficient amount of the property to pay the tax, penalties, interest and costs. When the tax bill is against a married woman, it may also be levied upon such personal property of her husband, not exempt from levy under a like tax bill against himself, as is found on any of the lands or improvements for which the married woman is assessed.

(2) Sales of personal property under such tax bills shall be for cash.

(3) In selling personal property, the levy, advertisements, sale and delivery shall be made in the same manner

as in the sale of goods levied under execution on a replevin bond.

91.480 (3001; 3003) Sale of real property for city taxes.

(1) If no personal property is reasonably available out of which the tax bill can be collected by distraint, the tax receiver shall sell, for cash, a sufficient amount of the real property belonging to the taxpayer to pay the tax, penalties, interest and costs, subject to the provisions of KRS 91.550. The sale shall be at public auction, in the same manner that property is sold under execution, except that the sale shall be had at the door of the city hall of the city in which the land lies, and the land need not be appraised or levied on. The sale shall be advertised by posting for fifteen days before the sale a written or printed notice at the city hall door, and by publication at least four weeks prior to the day of sale by one insertion in a newspaper published in the English language in the city.

(2) The tax receiver shall, not less than fifteen days before the sale, mail to the taxpayer a postal card addressed to his residence or place of business, if it can be ascertained, notifying him of the time and place of the sale. In order to cover the cost of the advertisement and notification, the tax receiver shall collect a fee of two dollars from each person whose property is advertised, and shall pay the fee into the city treasury. In no event shall the city pay the fee.

(3) The failure of the tax receiver to send or of the taxpayer to receive the notice of sale required by sub-section (2) of this section shall not invalidate the sale or any subsequent proceedings thereunder, and no levy or attempted levy upon personal property shall be necessary to validate any sale of real property, whether for taxes or real property, personal property or both.

91.510 (3002) Redemption of real property sold at tax sale.

(1) The owner of any real property sold for city taxes, or his heirs, representatives or assigns, shall have the same right to redeem such property from the purchaser thereof as is provided by law in the case of real property sold under execution, by paying to the tax receiver the amount of the purchase price at the sale, with interest thereon at the rate of one percent per month, or fraction thereof, from the date of sale, and in case the land is not redeemed before April 1 next succeeding the sale, by paying a further penalty of five percent upon the purchase price. In the case of an adult owner redemption must be made within two years from the date of sale, and in the case of an infant owner it must be made within one year after he becomes of age. During the period allowed for redemption, or until redemption, the property shall be assessed for subsequent tax levies in the name of the delinquent taxpayer, and during that time the property shall not be sold for the collection of such later tax bill, but the delinquent taxpayer shall be required, on redeeming the property, to pay those bills, with interest and penalties, in addition to paying the purchase price, with interest and penalties, as above required.

(2) All money paid in redemption of real property sold for city taxes shall be paid to the tax receiver, who shall account for the money in the same manner and to the same officer as in the case of regular tax collections, except that when the purchaser at a tax sale is not the city the tax receiver shall pay over to the purchaser, upon proper receipt, the amount of the purchase price, with interest and penalties thereon. All money paid by the delinquent taxpayer at the time of redemption is discharge of tax bills on assessments made against the property subsequent to the tax for which the sale was had shall be accounted for by the tax receiver as other tax collections.

(3) The tax receiver shall, by postpaid letter or card, promptly notify the purchaser at a tax sale of the redemption of the land purchased by him.

91.540 (3004) Deed to purchaser at tax sale; effect as evidence.

If real property is not redeemed within the time allowed for redemption, a fee simple title shall vest absolutely in the purchaser, subject only to state taxes, and the tax receiver shall thereupon convey the property by deed to the purchaser. The purchaser shall then be entitled to possession of the property, and may recover it by action or motion. Any purchaser other than the city shall pay all city tax bills on assessments made against the property after the assessment of the tax for which it was sold, with interest as provided by KRS 91.430, and the tax receiver shall not convey the property to the purchaser until all such tax bills have been paid. The deed shall be prima facie evidence of the regularity of the sale, of all prior proceedings, and of title in the purchaser to whom the deed is executed.

91.560 (3001; 3006) Tax lien.

(1) The fee simple of all lands in the city, and the full term and renewal of every leasehold carrying with it the value of the improvements thereon, shall be subject, from *and after July 1 of each year,* to a lien for the city taxes to be assessed thereon for the succeeding year. The lien shall be superior to homestead right and to all encumbrances, whether made before or after that date, except state taxes, and shall take precedence of dower, curtesy, remainders, reversions and other future estates.

(2) From the beginning of any action to collect taxes against real property, a lien for each tax bill assessed against the same owner or set of joint owners shall also arise upon every tract of land or improvement still owned

by him or them, with a view to the sale of less than all the tracts for the entire tax bill, subject to such marshaling of burdens as against third parties as the rules of equity require. The court may allow a purchaser or encumbrancer to release any tract from the tax lien thereon, by paying its share of the tax, interest and costs.

(3) The tax lien on real property provided for by this section shall attach though, through error in the proceedings, the tax bill is unenforceable, in which case the lien reaching back to the date named shall support the claim of the city for any taxes imposed afterward for the year in question under any curative Act of the General Assembly.

(4) The city shall have a lien on personal property as provided in the case of real property for its taxes.

418.040 (C.C. 639a-1) Plaintiff may obtain declaration of rights if actual controversy exists.

In any action in a court of record of this Commonwealth having general jurisdiction wherein it is made to appear that an actual controversy exists, the plaintiff may ask for a declaration of rights, either alone or with other relief; and the court may make a binding declaration of rights, whether or not consequential relief is or could be asked.

418.045 (C.C. 639a-2) Persons who may obtain declaration rights; enumeration not exclusive.

Any person interested under a deed, will or other instrument of writing, or in a contract, written or parol; or whose rights are affected by statute, municipal ordinance, or other government regulation; or who is concerned with any title to property, office, status or relation; or who as fiduciary, or beneficiary is interested in any estate, provided always that an actual controversy exists with respect thereto, may apply for and secure a declaration of his right or duties, even through no consequential or other relief be asked. The enumeration herein contained does not exclude other instances wherein a declaratory judgment may be prayed and granted under KRS 418.040 of this act, whether such other instance be of a similar or different character to those so enumerated.

418.050 (C.C. 639a-3) Method of obtaining declaration; advancement on docket.

Declaration of rights and determination of questions of construction, as herein provided for, may be obtained by means of proceedings at law or in equity, or by means of a petition on either the law or equity side of the court, as the nature of the case may require; and insofar as a declaration of rights is the relief asked, the case may be docketed for early hearing as in the case of a motion.

Baldwin's Kentucky Revised Statutes, 1955, Chapter 91,
pages 228, 229, 230, 231; Chapter 418, pp. 17, 18 and 19.

Office-Supreme Court, U.S.
FILED
OCT 29 1962
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1961

No. [redacted] 154

RALPH RICHARDSON, - - - - - - Petitioner,

versus

C. C. BRUNNER, alone Case 1, - - Respondent.

C. C. BRUNNER,
CITY OF LOUISVILLE, KENTUCKY,
VERNON H. WETHERBY, Tax Receiver,
WM. B. MEYER, Director of Finance,
HON. JOHN B. BRECKINRIDGE, Attorney General.
Case 2, - Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY.

PETITIONER'S PETITION FOR REHEARING

Rules 25(2), 58(2).

PLEASE PATIENTLY READ CERTIFICATE OF GOOD FAITH, ETC.

Rule 58(2).

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1961

No. 1009

Ralph Richardson, - - - - - - *Petitioner,*

v.

C. C. Brunner, alone Case 1. - - - *Respondent.*

C. C. Brunner,
City of Louisville, Kentucky,
Vernon H. Wetherby, Tax Receiver,
Wm. B. Meyer, Director of Finance,
Hon. John B. Breckinridge, Attorney General. } Case 2. - *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY.

PETITIONER'S PETITION FOR REHEARING

Rules 25(2), 58(2).

PLEASE PATIENTLY READ
CERTIFICATE OF GOOD FAITH, ETC.
Rule 58(2).

May it please the Court:

I.

CASE 1 DEFAULT JUDGMENT OF OCTOBER 22, 1956 ABSOLUTELY VOID — TAKES PETITIONER'S PROPERTY WITHOUT DUE PROCESS OF LAW IN PLAIN VIOLATION OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

A very real keen sense of right, justice and equity constrained me (Robert Hubbard) to file this petition for a rehearing. I sincerely, humbly and earnestly plead with this Honorable Court to reconsider their order denying the petition for a Writ of Certiorari, and I want to especially point out in Case 1, that the default judgment of October 22, 1956 is absolutely void and, therefore, takes petitioner's property without due process of law contrary to and in violation of the Fourteenth Amendment of the Constitution of the United States.

To this end, I boldly assert that:

1. Three elements or conditions must exist to clothe a court with jurisdiction to render a valid judgment. They are: (1) jurisdiction of the person; (2) jurisdiction of the subject matter; (3) a complaint that states a cause of action. If any one of them is lacking, any judgment rendered on such complaint is absolutely void and may be set aside at any time.

2. Where a claim is based upon a statute, the complaint must definitely and specifically set forth all the

provisions of said statute or else it is fatally defective, and any judgment rendered thereon is absolutely void.

3. The trial court had no jurisdiction in Case 1 at the bar to render said default or any judgment, because respondent's complaint did not set forth the provisions of KRS 91.540 upon which it was based and therefore did not state a cause of action.

4. Respondent's claim, if any he has, to the property in Case 1 is based upon the provisions of KRS 91.540 (see Appendix to Petition, page 77) which is as follows

> "91.540 (3004). Deed to Purchaser at Tax Sale: Effect as Evidence.
>
> "If real property is not redeemed within the time allowed for redemption, a fee simple title shall vest absolutely in the purchaser, subject only to state taxes, and the tax receiver shall thereupon convey the property by deed to the purchaser. The purchaser shall then be entitled to possession of the property, and may recover it by action or motion. Any purchaser other than the city shall pay all city tax bills on assessments made against the property after the assessment of the tax for which it was sold, with interest as provided by KRS 91.430, and the tax receiver shall not convey the property to the purchaser until all such tax bills have been paid. The deed shall be prima facie evidence of the regularity of the sale, of all prior proceedings, and of title in the purchaser to whom the deed is executed."

Respondent's complaint (see Tr. of Record, Case 1, pp. 10-12), omitting the description of the property, in Case 1, is as follows:

"Comes the plaintiff, C. C. Brunner, and states that he is the record title owner of the hereinafter described property in Louisville, Kentucky:

(Description omitted)

"Plaintiff states that Ralph Richardson is made a party hereto to assert any claim or interest in the above-described property that he may have by reason of a deed to him dated August 12, 1946 and recorded in Deed Book 2154, page 570 in the office of the clerk of the Jefferson County Court, Jefferson County, Kentucky.

"Plaintiff says that his rights are affected, and that an actual controversy exists with respect to his rights, under KRS 91.540; that the plaintiff contends that he is the fee-simple owner of the heretobefore described property and that he is entitled to the immediate possession of the said property, and that he is entitled to a declaration of his rights by this Court.

"Plaintiff states that there is a mortgage against the said property payable to M. and Fannie Kaufman recorded in Deed Book 2154 page 570 in the office of the clerk of the Jefferson County Court, Jefferson County, Kentucky; that they are made parties to this action to assert any claim that they may have against the said property.

"Plaintiff says that the defendants M. Kaufman and Fannie Kaufman are non-residents of this state and that they are absent therefrom; that they are now residents at 212 Main Street, Little Rock, Arkansas, which is the place wherein a post office is maintained nearest to the residence of these defendants.

"WHEREFORE, plaintiff, C. C. Brunner, prays this Court for a declaratory judgment directing the defendant, Ralph Richardson, to release any and all rights or claim that he makes against the property herein; that this plaintiff be declared to be the owner of the fee-simple title thereto; and for warning order attorney be appointed for the defendants Fannie Kaufman and M. Kaufman to notify them of the pendency of this action; and for all other relief to which he may appear entitled.

"(s) JOSIAH B. GATHRIGHT
for
BELL & GATHRIGHT
Counsel for Plaintiff
608-9 Realty Bldg.,
CLay 4894

"Plaintiff, C. C. Brunner, says that the statements contained in the above complaint are true as he verily believes.

"(s) C. C. BRUNNER
C. C. Brunner

"Subscribed and sworn to before me by C. C. Brunner, this the 20th day of April, 1956. My commission expires 6/7/57.

"(s) C. L. BELL
Notary Public, Jefferson Co., Ky."

On this point we most respectfully request this Honorable Court to reread paragraph E (1, 2, 3, and 4, pages 31-34 of Petitioner's Petition). Firmly believing that this Honorable Court has grievously erred in denying his petition, we most respectfully request the Court to reread the entire petition.

KRS 91.540 above quoted reads, in part, as follows:

> "If real property is not redeemed within the time allowed for redemption, * * * any purchaser other than the City shall pay all city tax bills on assessments made against the property after the assessment of the tax for which it was sold, with interest as provided by KRS 91.430, and the Tax Receiver SHALL NOT CONVEY THE PROPERTY TO THE PURCHASER UNTIL ALL SUCH TAX BILLS HAVE BEEN PAID." * * *.

Repeating, we most respectfully call the Court's attention to the fact that Respondent's complaint omits the above two vital conditions of KRS 91.540. Hence, it is fatally defective, it does not state a cause of action. The default judgment of October 22, 1956 rendered upon it is, therefore, void, and takes this petitioner's property without due process of law.

II.

KRS 91.540 VIOLATES THE FUNDAMENTAL PRINCIPLE OF SEPARATION OF POWERS OR GOVERNMENTAL FUNCTIONS GUARANTEED BY BOTH THE FEDERAL AND KENTUCKY CONSTITUTIONS.

From the earliest pages of recorded history legislative, executive and judicial functions—powers—of civil government have been generally reposed in one person—a king, an emperor, a dictator, or in some small body of men. The framers of the United States Constitution (they were learned in the science of civil government, they were able and patriotic men) knew, realized, and were aware of the very, very grave danger of reposing in one man or one body of men all powers or functions—legislative, executive and judicial—of civil government. The framers of the Federal Constitution were well aware that all too often men were deprived—many times by force and violence—of their inalienable rights (among which was and is the right to the ownership and protection of private property, even against tyrannical and oppressive collection of taxes) by oppressive orders, decrees or laws promulgated or enacted by one man or one small set of men. Hence, they separated the powers of the government in our Federal Constitution. The separation of said powers is very distinct and definite. The framers of Kentucky's constitution were also learned, able and patriotic men. They likewise separated in the Kentucky constitution the legislative, executive, and judical departments. See Section 27 of Kentucky Constitution, Appendix, page 69. The very letter and spirit of both the Federal and Kentucky constitutions prohibit the combining of any two, legislative, judicial or executive functions of government in one person or group of persons. Hence, any statute or law, state or Federal, which does so combine two or more of said departments or functions of civil government in one person or group of persons, is in plain violation of both the letter and the spirit of the Federal and Kentucky Constitutions.

In Brunner v. Bell (Ky.), 290 S. W. 2d 461, upon which the Court of Appeals of Kentucky quotes to sustain their opinion, they said:

> "WE HAVE HELD CONSISTENTLY THAT PROCEEDINGS TO SELL PROPERTY FOR TAXES MUST CONFORM TO STATUTORY PROVISIONS, AND PROCEEDINGS WHICH FAIL TO DO SO ARE VOID."

Now KRS 91.470 and KRS 91.480 (see Appendix IV, pp. 74-75 of Petitioner's Petition) name the statutory conditions and provisions by which the City Tax Receiver (a ministerial or executive officer) is governed in the sale of real property for taxes. It is a question of fact, for judicial determination, as to whether or not the tax receiver in the sale of real estate for taxes does or did, in the cases at bar, comply, in the sale of real estate involved, with the provisions of KRS 91.470 and 91.480. He did not. He neither attempted to (1) distress any personal property, or

(2) to hold an auction, and sold more property than was necessary to pay the city tax bills in Case 1.

Mr. Wetherby, the City Tax Receiver, was honest. He candidly admitted (1) that he never distrained personal property; (2) that he never held an auction.

> "Q. Mr. Wetherby, since you became the City Tax Receiver for the City of Louisville in 1952, up to the present, have you ever levied upon or distrained personal property of any delinquent taxpayer before you sold the real estate for delinquent taxes?
>
> Mr. Bell: Again enter my objection because he had not alleged in his pleadings any allegations in reference to levying on personal property.
>
> Mr. Hubbard: You decline to answer that?
>
> The Witness: I might answer it, No.
>
> Q. You never have?
>
> A. No. * * *
>
> Q. I'm talking about since you have been Tax Receiver, you have never distrained on any personal property for any delinquent tax bill?
>
> A. That's right. * * * (Tr. 1, Case 2, pp. 38-39).
>
> Q. Mr. Wetherby, in sales of delinquent tax bills on real estate, you just sit around a table and ask this man and that man if he wants this piece of property or that piece of property, is that right?
>
> A. Yes, sir, that is the way the sale is conducted.
>
> Q. In other words, Mr. Wetherby, you don't auction and say, 'who will bid on this tax bill, so much,' or anything like that?

A. No, sir, I do not.

Q. Let's go over and ask—

A. We only—we only sell for the amount of the taxes due the City. There is no bidding on it.

Q. You just—if you mean that circle around you, ask him if they want this or that?

A. There is probably eight or ten of them there.

Q. I say a few men—

A. Yes, sir, a few.

Q. You just ask which one wants this—

A. That's right."

(See Tr. of Record, Case 2, pp. 37-38.)

Certainly KRS 91.540 leaves the question to the tax receiver, an executive officer, a judicial question of fact, as to whether or not he has, in the sale of the property for taxes, complied with the statutory provisions, and, hence, said section of the statute combines judicial and executive functions in one man in plain violation of both the spirit and the letter of the separation of governmental functions or powers in both the Federal Constitution and the Constitution of Kentucky and is, therefore, unconstitutional.

III.

DUE PROCESS OF LAW DEMANDS NOTICE AND HEARING BEFORE, *NOT AFTER*, PRIVATE PROPERTY IS TAKEN, EVEN FOR THE COLLECTION OF TAXES.

We keenly feel that duty requires us to again emphasize this very, very fundamental priinciple before this Honorable Court.

In all due respect to the Court of Appeals of Kentucky, we most respectfully, yet emphatically, assert and maintain that said court grievously erred in holding in Case 2 at the bar (see Appendix III, pp. 63-66 of the Petition) that KRS 91.540 was and is constitutional because they (the Court of Appeals of Kentucky) had held in Brunner v. Bell, *supra,* and other cases that, if, in the sale of real property for taxes, the statutory provisions were not complied with, the tax deed was void ab initio, and the taxpayer might recover his property after it had been taken. Such serious, grave and erroneous reasoning is like locking the barn door after the horse has escaped. It is like calling black white, or wrong right, or evil good. To hold that the taxpayer may possibly after his property has been taken, recover it, is to emaciate and destroy due process of law both under the Federal and Kentucky constitutions. We have read many opinions from both state and federal courts and this is the first time (though we may have overlooked some) that we have found a case that holds that a statute is constitutional because after the taxpayer's property has been taken he may possibly recover it. We have not found any legal text writers that so hold, either.

The fallacy of such reasoning is two-fold, first, as we have repeatedly pointed out and emphasized, it ignores and evades the very plain meaning of due-process of law, that a person shall have an opportunity to be heard before, NOT AFTER, his property is taken, and, second, practically speaking it is almost impossible for him to recover his property under rule of Brunner v. Bell, *supra.*

Case 1 at the Bar, Appendix I, II, III, pp. 55-63, Most Aptly and Vividly Demonstrates This.

In Case 1 just mentioned Petitioner, on November 23, 1956, made a timely motion to set aside the default judgment supported by his affidavit (see T. of Record, Case 1, pp. 15-21) which, under the authority of Brunner v. Bell, *supra,* set up a perfect defense In disposing of this Motion the Court of Appeals of Kentucky in Richardson v. Brunner, 327 S. W. 2d (Ky.) 572, said:

> "For the purpose of this discussion we shall assume that the Defendant, Richardson, had a valid defense, while highly questionable, we shall likewise assume that he properly defined this defense in his motion."

He presented not merely a valid, but a perfect defense.* The Court, however, continued by saying that:

> "This does not of itself entitle the defendant to the relief sought. He must explain why he did not present that defense upon the trial and thus excuse his default." (See Appendix I, p. 57.)

Petitioner did explain why he did not present said defense. Among other things the petitioner, in his affidavit of November 23, 1956, in support of his motion to set aside the default judgment of October 22, 1956, said:

> "6. The said Simons told affiant, at the time of this conversation, to contact Messrs. Bell and Gathright, in the Realty Building, who were attorneys for C. C. Brunner, about making arrangements to pay these taxes. Affiant states that thereafter he went to the offices of Bell and Gathright, in the Realty Building, and talked to either Bell or Gathright, and affiant believes that he talked to Gathright, although he cannot be certain.
>
> * * * * * * * *
>
> "8. Affiant states that during this conversation he asked this attorney if he could not pay ONE THOUSAND DOLLARS ($1,000.00), which sum he had previously been informed by other sources was due and owing. The attorney refused to accept said sum and said that he would have to pay the sum of SEVEN THOUSAND DOLLARS ($7,000.00) immediately in order to get the property released back to affiant.
>
> "9. Affiant states that after this conversation he visited Mr. Charles Strull of 318 Armory Place to see if Mr. Strull would lend him some money to pay these taxes. The said Strull advised him

to go back to Bell and Gathright, the said attorneys, to see if they would not accept a lesser sum after being assured by Mr. Strull that he would lend to affiant as much as FOUR THOUSAND to FIVE THOUSAND DOLLARS ($4,000.00 to $5,000.00) toward the payment of this indebtedness.

"10. Affiant states that he returned to the offices of Bell and Gathright in the Realty Building to see if they would accept a lesser sum, but they refused. Also, Bell and Gathright refused to take any of the SEVEN THOUSAND DOLLARS ($7,000.00) in installment payments.

* * * * * * *

"15. Affiant states that after the above stated conversations, he had with Bell and/or Gathright as to the amount of taxes due, he had given up all hope of being able to save said property because of the sum in excess of SEVEN THOUSAND DOLLARS ($7,000.00) that was demanded of him.

"16. Affiant further states that he had no money with which to hire an attorney.

"17. Affiant states that because of his ignorance of the true facts of this case, his rights, and his illiteracy, he did not defend this action" (Tr. Record, Case 1, pp. 18-20).

* * * * * * *

Mr. Gathright, on November 29, 1956, filed his counter affidavit as follows:

"Affiant, Josiah B. Gathright, says that he is an associate of C. L. Bell and that they are counsel for C. C. Brunner in the above styled action.

> "Affiant states that he had two conversations with the defendant in the above styled action in the summer of 1955 in regard to the repurchase of the property in this action from the plaintiff, C. C. Brunner. There were no misrepresentations made to the said Ralph Richardson, he was merely told what Mr. Brunner would take to reconvey the property to the said Richardson.
>
> "The affiant states that the attorney now representing Ralph Richardson is also attorney of record for Otto and David Rouek who have conflicting interest with the defendant Ralph Richardson.
>
> "The affiant says that the said Ralph Richardson did have counsel representing him at the time of the discussions with this affiant. This affiant says that he discussed this matter with Carl Helman who had counseled the defendant Ralph Richardson also with Thomas J. Knight who represented the defendant Ralph Richardson as shown by the photostat of a letter from Mr. Knight attached hereto and made a part of this affidavit" (Tr. Record Case 1, p. 22).

The letter of Judge Knight, Tr. of R. Case 1, p. 97, which Mr. Gathright referred to, was written on January 30, 1956 to petitioner's rental agent, Arnold Simons. Judge Knight, in his affidavit, said that in reality he did not represent petitioner, but did represent a Mr. Strull who was contemplating lending money to petitioner to pay Mr. Brunner. In Judge Knight's letter, he complained to Mr. Simons, Richardson's rental agent, that he, Simons, was withholding Richardson's rents at the request of the respondent or his counsel. So, four months before Brunner's suit was filed in 1956, he and his counsel had a strangle hold on Richardson's rentals.

AT THIS TIME RESPONDENT, MR. BRUNNER, HAD PAID LESS THAN ONE THOUSAND DOLLARS ($1,000.00) IN TAXES, AND MR. STRULL WAS WILLING TO LOAN PETITIONER FOUR OR FIVE THOUSAND DOLLARS. See Strull's Affidavit, pp. 23, 24, Tr. of R., Case 1. Mr. Helman, in his affidavit, says that he never represented the petitioner. Tr. of R., Case 1, pp. 24-25. Judge Knight, in his affidavit, states that he did not represent the petitioner and concludes his affidavit in these words

> "5. In affiant's opinion, the defendant, Richardson, is an illiterate, uneducated, hard-headed Negro, who is not fully cognizant of all of his rights, * * *."

Mr. Brunner, Respondent in this case, is the same identical person as Mr. Brunner in Brunner v. Bell, *supra.* His counsel, Messrs. Gathright and Bell, in that case, are his counsel in the case at bar. They knew that, if the city tax receiver failed (1) to distrain personal property; (2) failed to auction the tax bill; or (3) sold more real estate than was necessary to pay the tax bills, the deed to Mr. Brunner in the case at bar was void *ab initio.* In Case 2 (see pp. 9-10 above), the same tax receiver, Mr. Wetherby, who sold the property involved in these consolidated actions, before the court, admitted that he (1) never distrained any personal property; (2) that he never had an auction. In Case 1 the trial court (see Tr. of R., Case 1, pp. 29-32) erroneously refused to permit your petitioner to take Mr. Wetherby's deposition to show these facts, and the Court of Appeals of Kentucky erroneously failed to pass upon the trial court's ruling. Counsel, Mr. Gathright, knew that Mr. Brunner's deed was void if the tax receiver, in the sale to Mr. Brunner, failed to comply with statutory provisions.

Query, was Mr. Gathright under any duty, moral or legal, when he talked to petitioner, to disclose to the petitioner that the tax receiver's deed to Mr. Brunner was void if the tax receiver (1) failed to distrain petitioner's personal property; or (2) to hold an auction or (3) had sold more property than was necessary to pay the tax bills? We just asked the question. Next question, even though such information was innocently withheld from your petitioner by counsel for respondent, Mr. Brunner, was the petitioner so mislead thereby that he was entitled to have the default judgment of October 22, 1956 set aside. See Fields v. Cornett, 254 Ky. 35, 42, 79 S. W. 2d 954; Kaze v. Compton (Ky.), 283 S. W. 2d 204, 207; Glock v. Carpenter, 184 F. Supp. 829, affirmed 286 F. 2d 431, Certiorari denied 81 S. Ct. 1651, 366 U. S. 930, 6 L. Ed. 2d 389. See 23 Am. Jur., Sec. 115, p. 898, etc. and Sec. 121, p. 910.

On March 11, 1957 petitioner filed another motion (Tr. of R., Case 1, pp. 34-35) and tendered an answer and counterclaim (Tr. of R., Case 1, pp. 36-42), which the court refused to file (but let it be tendered and made a part of the record) and to support his motion and tendered answer and counter claim filed on the same day his supplemental affidavit (Tr. of R., Case 1, pp. 48-54). Among other things in that supplemental affidavit, he said;

> "VI. * * * This affiant approached a representative or attorneys for the Plaintiff on several occasions and was unable to deal with them because they wanted more than the taxes, interest and penalties; and that on one occasion he offered to redeem—within the time allowed for redemption, as he now recalls—his property from tax sale by offering the Plaintiff's representatives $1,000.00 and to pay the difference or the balance in monthly payments, and that this offer was more, far more, than the amount of taxes, interest and penalties then due; that he was unable to raise the money to meet their demands, and that the amount of their demands increased as time went on, and that finally, sometime—he believes—in 1954 or 1955, he is not sure which, they demanded $7,000.00, far in excess of the amount of interest, penalties and costs, and they demanded it in cash, which was impossible for this defendant and affiant to raise, and that the Plaintiff, his Agents and Attorneys have by their exorbitant demands from 1951 on down to the present made it impossible for this affiant to raise the money to meet their demands. He says that the misconduct of the Plaintiff, his Attorneys and Agents, in demanding an exorbitant sum to redeem his property, has made it impossible for him to get up the money to pay it off.
>
> * * * * * * *

> "VIII. Affiant further states that he has no recollection of being served with a summons in this action, but he does not deny that he may have and was served but did not understand or know what it was at the time, and that when he inquired around and found out what it was about he tried to employ several lawyers to represent him, but that each and every lawyer he requested to represent him requested and demanded a substantial cash retainer fee, which he was unable to raise due to the misconduct of the Plaintiff in depriving him of rents, etc., and he was unable to get one to represent him in this action until after a default judgment had gone and he had no pleading in the case. * * *"

All of the above affidavits and pleadings were before the Court of Appeals of Kentucky on the first appeal. However, the Court of Appeals of Kentucky, in Richardson v. Brunner, 327 S. W. 2d (Ky.) 572 (see Append. I, p. 57 of the petition), said that your petitioner had failed to explain his failure to defend and that there were no misrepresentations that mislead him and that the trial court did not abuse a sound discretion in so holding. Silence, when there is a duty to speak, a failure to disclose the true facts, is often a more vicious fraud than actual misrepresentation. We respectfully maintain that there was an abuse of a sound discretion.

In Richardson v. Brunner, *supra*, Append. I, p. 57, the Court of Appeals of Kentucky, continuing, said:

> "(2) He says that he couldn't defend the action because of his inability to pay an attorney to

represent him. However, the record shows that he did procure an attorney shortly after the default judgment was taken. He does not undertake to say that he did not have the same resources before the default judgment as after. In fact, the record discloses that he owned property other than that involved in this action. The record also shows that, during the year in which this action was originally filed he was collecting rent. The record shows that he had from May until late October to make arrangements for counsel. There is sufficient evidence in the record upon which the court might determine that Richardson was able to employ counsel, and there is nothing in this motion to show that he tried to employ counsel."

In Case 1, Tr. of R., p. 11, your petitioner was served with a summons on May 24, 1956 and within two weeks thereafter on June 7, 1956 the court appointed a receiver to receive his rents, Tr. of R., Case 1, pp. 93-94. The receiver filed a report to the court on January 6, 1957, Tr. of R., Case 1, pp. 98-100. On January 28, 1957, Tr. of R., Case 1, p. 102, the rents were distributed but not to your petitioner, but to the respondent Mr. Brunner. Hence, the statement of the court that he was collecting rents is erroneous. The other property owned by him mentioned by the court, is the property involved in Case 2 and was at that time held by the Respondent Brunner under a quit-claim City Tax Receiver's deed.

Let me further quote from Petitioner's Supplemental Affidavit about the employment of an attorney:

> "* * * He states that after the default judgment had gone against him, Mr. Stewart Miller agreed to represent him for a fee of $2,000.00 *if he could win it*, and then, shortly thereafter, Mr. Miller urged him to give a quit-claim deed to an undisclosed buyer for anything that he could get out of it, even as little as $10.00, and that he, Mr. Miller, would take $500.00; and when this affiant refused to comply with Mr. Miller's wishes, counsel and request, Mr. Miller voluntarily withdrew from the case and returned his file to this affiant.
>
> "Affiant says that he was then very discouraged and despondent and that he could not raise any money, and he was finally sent to his present counsel, H. E. Rose and Robert Hubbard, who agreed to take his case on a strictly percentage basis. This affiant says that he did not neglect this case, but tried diligently to obtain counsel to represent him, but could not do so for reasons herein expressed." Tr. of R., Case 1, p. 53.

This statement in his affidavit clearly shows that he could not raise any money to pay an attorney, hence the statement of the Court of Appeals of Kentucky is misleading.

On March 24, 1959, Tr. of R., Case 1, pp. 103-105, Petitioner filed still another motion to set aside the default judgment of October 22, 1956 on two grounds: namely, (1) that said judgment was void because the complaint (see pp. 3-5 above) did not state a cause of action which clothed the court with jurisdiction to grant it, and (2) that KRS 91.540 upon which the complaint was allegedly based was and is in plain violation of the Fifth and Fourteenth Amendments of the

Constitution of the United States. In support of this motion, he filed his affidavit in which, among other things, he said:

> "When he had conversations with Mr. Brunner's attorney in the summer of 1955, Mr. Brunner's attorney did not inform him of his rights. Mr. Brunner's attorney did not tell him that the deeds were void ab initio. Mr. Brunner's attorney did not tell him that the Tax Receiver violated the statute in selling more real estate than was necessary. Mr. Brunner's attorney did not tell him that it was the Tax Receiver's duty to distrain and sell his personal property first. In short, Mr. Brunner's attorney did not inform him of any of his rights, but concealed all of his rights from him." Tr. of R., Case 1, p. 107.

On March 24, 1959 petitioner, see Tr. of R., Case 2, pp. 4-12, filed a complaint for a declaration of rights against the respondent, Mr. Brunner, to recover from Mr. Brunner the other property, on the ground that KRS 91.540 by which Mr. Brunner received a city tax deed, was unconstitutional and in plain and direct violation of the Fifth and Fourteenth Amendments of the Constitution of the United States.

The trial court dismissed his complaint. The Court of Appeals of Kentucky—see Append. III, pp. 63-66—held that KRS 91.540 was constitutional and met the requirements of due process of law, because, they said, that in Brunner v. Bell, *supra,* and other cases, they had held that the taxpayer might recover his property after it had been taken by showing that in the tax sale of his property, the provisions of the statute had not been complied with. The utter futility of trying to recover his property—under the authority of Brunner v. Bell *supra*—is more than amply illustrated in Case 1 at the bar. For almost six long years, petitioner has been diligently, yes very, very diligently, trying to have the default judgment of October 22, 1956 (which is absolutely void, see pp. 1-6 above) by which his property was taken, set aside and to have his day in court, and to have a hearing on the merits. Case 1 at the bar is of itself most convincing, that a hearing, after property is taken, is not due process of law, either in letter or spirit.

A court of appeals of Kentucky has repeatedly held: (1) that default judgments are not favored; (2) that if timely motions are made presenting a valid defense, such default judgments shall be set aside; (3) that when the losing party is mislead by its adversary, a default judgment should be set aside; (4) that where vital material facts are known to one party and not disclosed to the other party, a deed should be cancelled; (5) that to clothe a court with authority to render a valid judgment, default or otherwise, a cause of action must be stated or else the judgment rendered thereon is absolutely void; ~~(6)~~ that a cause of action based upon the statute must plead the provisions of the statute, or else it is fatally defective, and any judgment rendered under it is absolutely void.

The Court of Appeals of Kentucky has erroneously denied your petitioner each and every remedy above mentioned, and finally, has committed their gravest error by holding that the possibility of recovering property after it has been taken, is due process of law.

IV.

KRS 91.540 VIOLATES THE FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES AND THE STATE OF KENTUCKY IN THAT IT TAKES PRIVATE PROPERTY FOR PUBLIC PURPOSES WITHOUT JUST COMPENSATION.

On this point we most respectfully request this honorable court to reread pages 17-19 and pages 48-50 of the petition. Will this honorable court, Case 1, allow petitioner's property, worth approximately $25,000, to be taken (in reality confiscated) for approximately $1,200 taxes for public purposes in plain violation of the Fifth Amendment of the U. S. Constitution? In Case 2, petitioner's property is worth approximately $3,500 and respondent takes it for a song. Surely, this honorable court will not sanction such unjust confiscation of petitioner's property and the very, very unjust enrichment of respondent at petitioner's expense.

V.

ABUSE OF POWER TO COLLECT TAXES IS A MOST POTENT FACTOR IN THE DOWNFALL AND OVERTHROW OF CIVIL GOVERNMENT—ETERNAL, UNCHANGEABLE PRINCIPLES VIOLATED —DEFENSE.

1. Power to Tax—Power to Destroy.

In McCulloch v. State of Maryland, *et al.*, 17 U. S. 316, 4 Wheat 316, 4 L. Ed. 579, at p. 607, Chief Justice Marshall said:

> "* * * that the power to tax involves the power to destroy."

The arbitrary power conferred on the Tax Receiver by KRS 91.540 is most certainly a power to destroy inalienable property rights.

I make no claim to being learned in law, especially constitutional law, or to history. Yet, I have some little knowledge of these subjects. It was my very happy, great privilege to study law under one of the greatest Chief Justices of his honorable court, namely, Chief Justice Harlan F. Stone. And, may I pause here, to pay a tribute to his memory. He was a man of deep, sympathetic understanding of human nature, a gentleman, and a scholar, a very able jurist, and, above all, a man of the highest honor and integrity. He was and still is an inspiration to me.

Now, I have studied history a little and am convinced that the abuse of the power to collect taxes, if not remedied, has been and is one of the most potent factors in the overthrow of civil government. This was true even before Solomon's time. Volumes could be written on this point alone. It was a very potent factor that brought about our own revolution. It was a most potent factor in the downfall of the French government and in provoking the French revolution—reign of terror—and the guillotine in 1789-1794. We most respectfully maintain that if this honorable court, by its silence, permits the opinion of the Court of Appeals of Kentucky in the case at bar to stand, there is grave possibility of abuse of power in collection of taxes that may sooner or later overthrow our own government.

2. Eternal, Unchangeable Principles of Inalienable Rights Violated.

John Greenleaf Whittier wrote one of the sublimest poems ever written in any language, entitled "Eternity". Let me quote the first stanza:

> "BOUNDLESS Eternity! the winged sands
> That mark the silent lapse of flitting time
> Are not for thee; thine awful empire stands
> From age to age, unchangeable, sublime:
> Thy domes are spread where thought can never
> climb,
> In clouds and darkness, where vast pillars rest.
> I may not fathom thee: 't would seem a crime
> Thy being of its mystery to divest,
> Or boldly lift thine awful veil with hands unblest."

I believe every member of the court would enjoy reading it.

Now, I am scarcely one-millionth part of a speck on the brint of eternity; scarcely one-millionth part of a grain of sand on the seashores of time; scarcely one-millionth part of a drop of water in all the seas, oceans, lakes and rivers. But, we are fighting for the eternal principles of right against wrong, of justice against oppression. We are earnestly contending for the inalienable, inviolate right of a property owner, under both Federal and Kentucky constitutions, to a hearing before, **NOT AFTER**, his property is taken or conveyed for a tax bill. This right, so often trampled under foot will remain, until the eternal living supreme Being of the Universe sees fit for time to be no more and man to cease inhabiting the earth.

Le me quote a few sentences from earlier opinions of the Court of Appeals of Kentucky:

From the opinion of the City of Louisville v. Cochran, 82 Ky. (John Rodman), 15, we quote some pertinent statements or principles:

> "It is important that we understand, here what is the meaning of 'due process of law', or 'the law of the land'.
>
> "This court said, in Varden v. Mount, Hines, Judge, 78th Kentucky, 89:
>
> " 'The meaning of that provision has generally been construed to be a law that hears before condemning, and arrives at a judgment for the divestiture of the rights of property through what is ordinarily understood to be judicial process—the general rules that govern society in reference to the rights of property'." * * *
>
> *"It is now generally understood by citizens, as well as courts, that the Legislature has no power to interfere with title of the citizen to his property, or to interrupt him in its free enjoyment, much less to transfer it, against his will, to another, either by express enactment or destruction of the remedies for its defense and protection."* * * *
>
> "And, while this summary remedy for levying, assessing, and collecting taxes has the plea of necessity and immemorial usage for its support,

every dictate of natural justice and the letter and spirit of the constitution require that the citizen shall be warned, and have an opportunity to be heard before he is condemned, or his money or property taken, and secure to him the right to have a judicial hearing upon the existence of an alleged power and the legality of its exercise whenever his constitutional rights are imperiled thereby." * * *

"For the direct destruction of individual rights by legislative declaration is no less unconstitutional than the enactment of remedies which lead to similar results. (Vanzant v. Waddell, 2 Gerger, 270.)

"*And the manner of the exercise of an otherwise just and clear authority may be as usurpatory as an arbitrary assumption and it is the most insidious method of unauthorized acquisition of power, whose slightest touch should be the instant for pause, and its first and every assertion the occasion for fearless resistance, and the ground of respectful, but determined disregard.*" * * *

". . . Thus, while summary process, based upon necessity and immemorial usage, is allowed, and its execution generally and properly confided to ministerial officers, the rights of the citizen are guarded by 'the law of the land" from invasion, in the name of this very summary process itself, and by the unregulated assertion and the unconstitutional assumption of power; * * *"

In Maguiar v. Henry, etc., 84 Ky. 1, the Court of Appeals of Kentucky said:

"The laws for the assessment and collection of taxes are necessarily summary in their character.

> Title is divested by special statute; but it is stricti juris, and must be followed in all material respects. The taxpayer is entitled, by 'the law of the land', to be heard before he is condemned. * * *.
>
> "The Constitution of the United States reechoes this fundamental rule, so early established, by providing that no person shall be deprived of life, liberty, or property, 'without due process of law'; while our State Constitution says, 'nor can he be deprived of his life, liberty or property unless by the judgment of his peers or the law of the land'." * * *
>
> "When a litigant claims right under the act of an officer he should state the facts which show that the latter had a right to act. A tax deed results from the exercise of a statutory power; and if the necessary preliminary steps are not taken, the power is not created. . . ."

In the case of Board of Levee Com. v. Johnson, *et al.,* 178 Ky. 287, 119 S. W. 8, the Court, among other things, said:

> "* * * We need only to say that the substance of them is that 'due process of law', and 'the law of the land' mean when applied to actions, proceedings or prosecutions pending in any court that no citizen shall be deprived of his life, or his liberty, or his property, without reasonable notice and reasonable opportunity to be heard according to the regular and established rules of practice and procedure before judgment is pronounced depriving him of either." *

The Court of Appeals of Kentucky in the case at bar, Case 2, Appendix III, p. 65, said that the above cases had no application to the case at bar. We most respectfully maintain that the principles of law enunciated in ther apply to any statute that gives an executive officer the right to convey a taxpayer's property without giving him a chance to be heard, before his property is conveyed, on whether or not, in the sale of the property, the provisions of the statute respecting the sale have been complied with.

It is quite possible that this honorable court may consider the writer a fanatical dreamer or visionary. I may be a dreamer or a visionary, but I am not either crazy or a fanatic. I am a very, very real realistic person and I have a very real and abiding conviction that, it is not only quite possible, but very probable, that, if this honorable court, by its silence, approves and lets the opinion of the Court of Appeals of Kentucky, involved herein, stand to the effect, that where a taxpayer may possibly recover his property after it has been taken, by a statute which takes it without notice or a hearing, meets the requirements of due process of law, then said opinion of the Court of Appeals may be the opening wedge whereby due process of law is emaciated and destroyed and that part of our constitution will become a mere scrap of paper.

If this honorable court, by its silence, approves and affirms the judgment in these cases, to the effect that property may be taken for the collection of taxes for public (all taxes are, in our theory and system of government, for public purposes) purposes, without a hearing and without just compensation, then the Fifth and Fourteenth Amendments of the Constitution of the United States is nullified and becomes a mere scrap of paper.

The German people were and still are a great people. They had, under the Weimer republic, a constitution which protected the rights of its citizens. Unfortunately, they let Hitler destroy their constitution while apparently working within it. There is no need for me to emphasize the appalling consequences. But, you say that this cannot happen in America. It can if statutes in plain violation of the fundamental rights guaranteed by our constitutions are not allowed to stand, as in the cases at bar. "Eternal vigilence is the price of liberty", said Daniel Webster.

In October, 1871; a cow kicked over a lantern in Chicago. A great city was almost completely destroyed by fire. In the summer of 1914 the Archduke of Austria was assassinated. It was the match, so to speak, that started World War I.

If this Honorable Court, by its silence, approves and confirms the Court of Appeals of Kentucky in the cases at bar, it is quite probable that such silence will be a spark that will consume and destroy the effectiveness of the Fifth and Fourteenth Amendments of the United States Constitution, as well as Kentucky's constitution.

3. Defense.

We have and are spending billions of dollars for defense. Wherein does our greatest defense lie? Does it lie so much in our vast armed forces or does it lie more in the character of our people themselves? Lincoln once said, in substance, that if our country was ever destroyed, it would not be by foes without, but suicide from within. It is the writer's firm conviction that among the surest defenses we have, is that of maintaining inviolate our inalienable constitutional rights, among which are: (1) the right to be heard before, not after, our property is taken, even for the collection of taxes, and (2) the right to have just compensation for our property when it is taken for public purposes, for the collection of taxes.

For reasons hereinabove set forth, we most earnestly plead with this Honorable Court not only to grant this petition for a rehearing, but to grant petitioner's petition for a writ of certiorari.

Respectfully submitted,

Frank E. Haddad, Jr.,
Robert Hubbard,
Kentucky Home Life Building,
Louisville 2, Kentucky,
Counsel for Petitioner.

Hector E. Rose,
Of Counsel.

CERTIFICATE OF GOOD FAITH, ETC.

Rule 58(2)

I, Robert Hubbard, Counsel for Petitioner, in all sincerity and good faith, state: (1) that this petition is not filed for delay; (2) that, although the other substantial ground hereinabove stated in paragraph II, pp. 7-10 was available, it has not previously been mentioned; (3) that, not out of any disrespect or disregard (I most truthfully and solemnly assure the Court) for the rules of this Court or of this Honorable Court, but, (a) out of a fine conviction that the court has erred in denying Petitioner's Petition, (b) out of firm conviction, not only for Petitioner but for all real property owners, that the ends of justice require that his petition be granted, (c) out of a fervent hope that even yet his petition may still be granted, I have in paragraphs I, pp. 1-6; III, pp. 11-23; IV, p. 24, and V., pp. 24-32, either summarized or enlarged arguments heretofore made. I am fully persuaded that this Honorable Court is composed of too great men to take offense, that it governs and controls its own rules.

Confidently hoping,

Respectfully submitted,

ROBERT HUBBARD,
Counsel for Petitioner.